

  
Joey D. Moya

1           **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2  
3 **Opinion Number:** \_\_\_\_\_

4 **Filing Date:** \_\_\_\_\_

5 **NO. S-1-SC-36115**

6 **PUBLIC SERVICE COMPANY**  
7 **OF NEW MEXICO,**

8           Appellant,

9 v.

10 **NEW MEXICO PUBLIC REGULATION**  
11 **COMMISSION,**

12           Appellee,

13 and

14 **NEW ENERGY ECONOMY, INC.,**  
15 **NEW MEXICO INDUSTRIAL ENERGY CONSUMERS, and**  
16 **ALBUQUERQUE BERNALILLO COUNTY WATER**  
17 **UTILITY AUTHORITY,**

18           Intervenors-Appellees/Cross-Appellants,

19 and

20 **WESTERN RESOURCE ADVOCATES, NEW MEXICO**  
21 **ATTORNEY GENERAL, and COALITION FOR CLEAN**  
22 **AFFORDABLE ENERGY,**

23           Intervenors-Appellees.

1 **In the Matter of the Application of**  
2 **Public Service Company of New Mexico**  
3 **for Revision of its Retail Electric Rates**  
4 **Pursuant to Advice Notice No. 513,**  
5 **NMPRC Case No. 15-00261-UT**

6 **APPEAL FROM THE NEW MEXICO PUBLIC REGULATION**  
7 **COMMISSION**

8 PNM Resources, Inc.  
9 Patrick V. Apodaca  
10 Stacey J. Goodwin  
11 Albuquerque, NM

12 Miller Stratvert, P.A.  
13 Richard L. Alvidrez  
14 Albuquerque, NM

15 Keleher & McLeod, P.A.  
16 Thomas C. Bird  
17 Albuquerque, NM

18 for Appellant

19 Michael C. Smith  
20 Santa Fe, NM

21 for Appellee

22 New Energy Economy  
23 Mariel Nanasi  
24 Santa Fe, NM

1 for Intervener-Appellee/Cross-Appellant New Energy Economy

2 Peter Jude Gould

3 Santa Fe, NM

4 for Intervener-Appellee/Cross-Appellant New Mexico Industrial Consumers

5 Stelzner, Winter, Warburton, Flores, Sanchez & Dawes

6 Nann M. Winter

7 Albuquerque, NM

8 Dahl L. Harris

9 Santa Fe, NM

10 for Intervener-Appellee/Cross-Appellant

11 Albuquerque Bernalillo County Water Utility Authority

12 Steven S. Michel

13 Santa Fe, NM

14 for Intervener-Appellee Western Resources Advocates

15 Hector H. Balderas, Attorney General

16 Joseph M. Yar, Assistant Attorney General

17 for Intervener-Appellee New Mexico Attorney General

18 Charles F. Noble

19 Santa Fe, NM

1 for Intervener-Appellee Coalition for Clean Affordable Energy

2 Jones, Snead, Wertheim & Clifford, P.A.

3 Jerry Todd Wertheim

4 Carol A. Clifford

5 Santa Fe, NM

6 for Amicus Curiae El Paso Electric Company

1 **OPINION**

2 **VIGIL, Justice.**

3 {1} This appeal arises from the final order of the New Mexico Public Regulation  
4 Commission (Commission) granting part, but not all, of the increase in retail electric  
5 rates sought by the Public Service Company of New Mexico (PNM) in Case No. 15-  
6 00261-UT. The Commission's final order is appealed by PNM and cross-appealed by  
7 the Albuquerque Bernalillo County Water Utility Authority (ABCWUA), New  
8 Energy Economy (NEE), and the New Mexico Industrial Energy Consumers  
9 (NMIEC). On appeal, PNM, NEE, ABCWUA, and NMIEC all raise numerous issues  
10 with the Commission's final order. In this opinion we address challenges made to the  
11 Commission's decisions regarding Palo Verde Nuclear Generating Station, the  
12 installation of balanced draft technology at San Juan Generating Station, the new coal  
13 supply agreement at Four Corners Power Plant, the inclusion of Rate 11B in rate  
14 banding, PNM's prepaid pension asset, and the adoption of Method A.

15 {2} With respect to Palo Verde, PNM appeals the Commission's denial of recovery  
16 in its rate base for (1) the repurchase of 64.1 MW of Palo Verde Unit 2 capacity at a  
17 valuation of \$2,550/kW; (2) \$49 million in improvements made to Palo Verde Unit  
18 2; and (3) future recovery for nuclear decommissioning costs. In separate cross-  
19 appeals, NEE and ABCWUA each challenge the Commission's decision to allow

1 PNM to recover for the repurchased 64.1 MW at a net book value of \$1,306/kW and  
2 for the cost of renewing five leases at Palo Verde. We additionally address  
3 ABCWUA's argument that the Commission violated its right to due process by  
4 refusing to reopen the proceedings to allow replies to PNM's response to a bench  
5 request regarding Palo Verde.

6 {3} We also answer the remaining challenges to the Commission's final order:  
7 PNM's appeal to the Commission's decision to deny recovery of \$52.3 million for the  
8 installation of balanced draft technology at San Juan Generating Station; NEE's claim  
9 that the Commission acted unreasonably and unlawfully by allowing recovery of  
10 \$19.5 million for the new coal supply agreement at Four Corners Power Plant;  
11 ABCWUA's challenge to the Commission's decision to reject PNM's proposal to  
12 exclude Rate 11B from rate banding; and NMIEC's arguments that the Commission  
13 acted unreasonably or unlawfully by allowing recovery of \$137.8 million for PNM's  
14 prepaid pension asset and by adopting the Method A rate adjustment.

15 {4} We reject each of the arguments on appeal except one: we conclude that, by  
16 denying PNM any future recovery for its nuclear decommissioning costs related to  
17 the Palo Verde capacity at issue in this case, the Commission denied PNM due  
18 process of law. Therefore, we declare all other aspects of the Commission's final

1 order to be lawful and reasonable, yet must annul and vacate the final order in its  
2 entirety pursuant to NMSA 1978, Section 62-11-5 (1982). *See Hobbs Gas Co. v. N.M.*  
3 *Pub. Serv. Comm 'n*, 1993-NMSC-032, ¶ 6, 115 N.M. 678, 858 P.2d 54 (concluding  
4 that the Court may declare parts of an order to be reasonable and lawful while  
5 vacating an order in its entirety pursuant to Section 62-11-5). We remand the case to  
6 the Commission for further proceedings as required and the entry of an order  
7 consistent with this opinion. *See Hobbs*, 1993-NMSC-032, ¶ 6 (recognizing that on  
8 remand “the Commission may properly enter an order embodying those provisions  
9 in the earlier, vacated order that have been declared reasonable and lawful”); *Pub.*  
10 *Serv. Co. v. N.M. Pub. Serv. Comm 'n*, 1979-NMSC-042, ¶¶ 13, 24, 92 N.M. 721, 594  
11 P.2d 1177 (remanding to the Commission for the entry of an order based on  
12 substantial evidence and acknowledging that the Commission may conduct additional  
13 hearings as necessary).

#### 14 **I. BACKGROUND**

15 {5} The complexity of this case compels us to begin our opinion by setting forth  
16 a brief overview of the procedural history as well as the relevant legal background.  
17 *See New Energy Economy v. Pub. Regulation Comm 'n*, 2018-NMSC-024, ¶ 2, 416  
18 P.3d 277. Additional background is provided as necessary in our discussion.

1 **A. Procedural Background**

2 {6} On August 27, 2015, PNM filed an application with the Commission claiming  
3 a revenue requirement of approximately \$123 million. In accordance with its  
4 procedural rules, the Commission appointed a hearing examiner to preside over the  
5 ratemaking proceedings and submit a recommended decision to the Commission. *See*  
6 1.2.2.29(B), (D)(4) NMAC. Nearly twenty parties filed motions to intervene in the  
7 proceedings and, in a public hearing lasting three weeks and a two day supplemental  
8 hearing, over forty witnesses presented testimony on PNM’s proposed rate increase.

9 {7} After the hearing examiner issued her corrected recommended decision and the  
10 parties filed their exceptions to her recommendations, the Commission issued its final  
11 order that incorporated and adopted the corrected recommended decision except as  
12 expressly modified or disapproved. The Commission’s final order approved a revenue  
13 increase of \$61.2 million. The appeal and cross-appeals are taken directly from that  
14 order. *See* NMSA 1978, § 62-11-1 (1993) (“Any party to any proceeding before the  
15 [C]ommission may file a notice of appeal in the [S]upreme [C]ourt asking for a  
16 review of the [C]ommission’s final orders.”).

17 **B. Legal Principles Governing Rate Cases**

18 {8} We next set forth the general legal principles which apply to the setting of retail



1 electric rates by the Commission. The Commission has the general and exclusive  
2 power to regulate a public utility's rates under NMSA 1978, Section 62-6-4(A)  
3 (2003). A utility's rates are generally based upon the utility's revenue requirement,  
4 the traditional elements of which are "(1) determination of the costs of the operation,  
5 (2) determination of the rate base which is the value of the property minus accrued  
6 depreciation, and (3) determination of the rate of return." *Hobbs Gas Co. v. N.M. Pub.*  
7 *Serv. Comm'n*, 1980-NMSC-005, ¶ 5, 94 N.M. 731, 616 P.2d 1116.

8 {9} The Commission has the obligation to ensure that "[e]very rate made,  
9 demanded or received by any public utility [is] just and reasonable." NMSA 1978, §  
10 62-8-1 (1941). In meeting this obligation, the "Commission is vested with  
11 considerable discretion." *Hobbs*, 1980-NMSC-005, ¶ 4. The utility seeking an  
12 increase in rates bears the burden of demonstrating that the increased rate is just and  
13 reasonable. NMSA 1978, § 62-8-7(A) (2011).

14 {10} "The Commission [is] not bound to the use of any single formula or  
15 combination of formulae in determining rates. The rate-making function involves the  
16 making of pragmatic adjustments. It is the result reached, not the method employed,  
17 which is controlling." *Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*,  
18 1977-NMSC-032, ¶ 70, 90 N.M. 325, 563 P.2d 588. By statute, the Commission must

1 balance

2 the interest of consumers and the interest of investors . . . to the end that  
3 reasonable and proper services shall be available at fair, just and  
4 reasonable rates and to the end that capital investment may be  
5 encouraged and attracted so as to provide for the construction,  
6 development and extension, without unnecessary duplication and  
7 economic waste, of proper plants and facilities and demand-side  
8 resources for the rendition of service to the general public and to  
9 industry.

10 NMSA 1978, § 62-3-1(B) (2008). This balance between the interests of ratepayers  
11 and the interests of investors means that

12 the Commission must ensure that rates are neither unreasonably high so  
13 as to unjustly burden ratepayers with excessive rates nor unreasonably  
14 low so as to constitute a taking of property without just compensation  
15 or a violation of due process by preventing the utility from earning a  
16 reasonable rate of return on its investment.

17 *PNM Gas Servs. v. N.M. Pub. Util. Comm'n (In re PNM Gas Servs.)*, 2000-NMSC-  
18 012, ¶ 8, 129 N.M. 1, 1 P.3d 383. We have recognized that “[t]here is a significant  
19 zone of reasonableness” in which rates are neither ratepayer extortion nor utility  
20 confiscation. *Id.* (quoting *Behles v. N.M. Pub. Serv. Comm'n (In re Application of*  
21 *Timberon Water Co.)*, 1992-NMSC-047, 114 N.M. 154, 836 P.2d 73).

22 {11} Despite the Commission’s considerable discretion in the setting of just and  
23 reasonable rates, “the Commission is not free to disregard its own rules and prior

1 ratemaking decisions or ‘to change its position without good cause and prior notice  
2 to the affected parties.’ ” *PNM Gas Servs.*, 2000-NMSC-012, ¶ 9 (quoting *Hobbs*,  
3 1993-NMSC-032, ¶ 12). We also acknowledge that, despite the discretion and  
4 flexibility afforded to the Commission, our review of its decisions is not “superficial  
5 in nature” and that we “must review the method employed by the Commission and the  
6 Commission’s application of its chosen methodology to the evidence in the record in  
7 order to determine in a meaningful way whether the result is unreasonable or  
8 unlawful.” *PNM Gas Servs.*, 2000-NMSC-012, ¶ 103.

## 9 **II. STANDARD OF REVIEW**

10 {12} We review the Commission’s order to determine whether the “[Commission’s]  
11 decision is arbitrary and capricious, not supported by substantial evidence, outside  
12 the scope of the agency’s authority, or otherwise inconsistent with law.” *Doña Ana*  
13 *Mut. Domestic Water Consumers Ass’n v. N.M. Pub. Regulation Comm’n*, 2006-  
14 NMSC-032, ¶ 9, 140 N.M. 6, 139 P.3d 166; *accord* NMSA 1978, § 62-11-4 (1965).  
15 The party challenging the Commission’s order has the burden of making this  
16 showing. Section 62-11-4.

17 {13} In reviewing the Commission’s decisions, we first consider whether the  
18 decision presents a question of fact, a question of law, or a combination of the two.

1 *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n (NMIEC)*, 2007-  
2 NMSC-053, ¶ 13, 142 N.M. 533, 168 P.3d 105. Both questions of fact and questions  
3 of law are implicated in the numerous issues on appeal in this case.

4 {14} For questions of fact, this Court “look[s] to the whole record to determine  
5 whether substantial evidence supports the Commission’s decision.” *Id.* ¶ 24.  
6 Substantial evidence requires that there is evidence “that is credible in light of the  
7 whole record and that is sufficient for a reasonable mind to accept as adequate to  
8 support the conclusion reached by the agency.” *Id.* (quoting *Att’y Gen. of N.M. v.*  
9 *N.M. Pub. Util. Comm’n (In re Comm’n’s Investigation of the Rates for Gas Serv. of*  
10 *PNM’s Gas Servs.)*, 2000-NMSC-008, ¶ 4, 128 N.M. 747, 998 P.2d 1198). “We view  
11 the evidence in the light most favorable to the Commission’s decision, and draw  
12 every inference in support of the Commission’s decision, but we will not uphold the  
13 decision if it is not supported by substantial evidence.” *NMIEC*, 2007-NMSC-053,  
14 ¶ 24 (citations omitted). “The [Commission’s] decisions requiring expertise in highly  
15 technical areas, such as utility rate determinations, are accorded considerable  
16 deference.” *Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation*  
17 *Comm’n (ABCWUA)*, 2010-NMSC-013, ¶ 50, 148 N.M. 21, 229 P.3d 494 (internal  
18 quotation marks and citation omitted)).

1 {15} On questions of law, “[w]e will reverse the agency’s interpretation of a law if  
2 it is unreasonable or unlawful” and generally give little deference to the  
3 Commission’s construction of statutes. *NMIEC*, 2007-NMSC-053, ¶ 19. However,  
4 we accord some deference to the Commission’s interpretation of its own governing  
5 statutes and

6 will confer a heightened degree of deference to legal questions that  
7 implicate special agency expertise or the determination of fundamental  
8 policies within the scope of the agency’s statutory function. However,  
9 the court is not bound by the agency’s interpretation and may substitute  
10 its own independent judgment for that of the agency because it is the  
11 function of the courts to interpret the law.

12 *Id.* (quoting *Morningstar Water Users Ass’n v. N.M. Pub. Util. Comm’n*, 1995-  
13 NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28).

14 {16} Several parties also argue that various decisions of the Commission are  
15 arbitrary and capricious. “A ruling by an administrative agency is arbitrary and  
16 capricious if it is unreasonable or without a rational basis, when viewed in the light  
17 of the whole record.” *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm’n*,  
18 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806. We consider the issues raised on  
19 appeal under the overarching legal principles governing rate cases by applying the  
20 foregoing standards of review depending on whether a particular argument challenges

1 the facts, the law, or both.

### 2 **III. PALO VERDE NUCLEAR GENERATING STATION**

3 {17} We first address the challenges made to the Commission’s determination to  
4 allow PNM to recover part, but not all, of its costs associated with Palo Verde  
5 Nuclear Generating Station. We begin with a brief factual background of PNM’s  
6 involvement at Palo Verde, setting forth the facts relevant to PNM’s request to  
7 recover its costs in retail electric rates.

8 {18} PNM’s participation at Palo Verde began in 1977 when the Commission  
9 granted PNM a certificate of public convenience and necessity to own, operate, and  
10 maintain an interest in each of the plant’s three units. *See* NMSA 1978, § 62-9-1(A)  
11 (2005) (“No public utility shall begin the construction or operation of any public  
12 utility plant or system . . . without first obtaining from the commission a certificate  
13 that public convenience and necessity require or will require such construction or  
14 operation.”). In 1985 and 1986, in Case Nos. 1995 and 2019, the Commission  
15 authorized PNM to sell its ownership interests in Palo Verde Units 1 and 2 and then  
16 lease those interests back for approximately twenty-nine and twenty-nine and a half  
17 years, respectively.

18 {19} Under the terms of the leases, PNM had three choices when the leases expired:

1 (1) allow the lease to expire; (2) renew the lease at fifty percent the cost of the  
2 original lease; or (3) purchase the lease asset at a fair market value. In Case Nos. 1995  
3 and 2019, the Commission granted PNM authority to exercise its options to renew the  
4 leases or repurchase the capacity in accordance with these lease terms. Although it  
5 authorized PNM to retain the Palo Verde interests at the expiration of the original  
6 leases, the Commission retained full ratemaking authority over Palo Verde, including  
7 “the authority to disallow any or all of the lease expenses and transaction costs on a  
8 used-and-useful basis, on the basis of imprudency in the cost of the Facilities, or on  
9 any other lawful basis[.]”

10 {20} At the expiration of the leases on Palo Verde Units 1 and 2, PNM elected to  
11 repurchase 64.1 MW of Palo Verde Unit 2 capacity at a negotiated price of  
12 \$2,550/kW and to renew the five leases on the remaining capacity for eight years at  
13 fifty percent of the original cost. In this case, PNM sought to include the repurchased  
14 64.1 MW in its rate base at a valuation of \$2,550/kW. As the full purchase price for  
15 the 64.1 MW, the \$2,550/kW represented both the net book value of Palo Verde Unit  
16 2 and an acquisition adjustment for the amount paid over that net book value. *See*  
17 *Hobbs*, 1980-NMSC-005, ¶ 8 (defining an acquisition adjustment as “the amount paid  
18 for a plant in excess of original cost less accrued depreciation”). PNM also sought to

1 include in its cost of service the \$19.8 million in annual lease expenses for the five  
2 renewed leases. Finally, PNM sought to include an additional \$49 million in its rate  
3 base for leasehold and common plant improvements to the 64.1 MW incurred under  
4 the original leases.

5 {21} Existing utility jurisprudence grants wide latitude to the Commission’s choice  
6 of methodology used to determine a utility’s rate base. *Hobbs*, 1980-NMSC-005, ¶  
7 6 (“Neither New Mexico case law nor the Public Utility Act imposes any one  
8 particular method of valuation upon the Commission in ascertaining the rate base of  
9 a utility.”); *see* NMSA 1978, § 62-6-14(A) (2009). However, the Commission “is  
10 bound by, and limited to . . . previously established methods of ratemaking, absent a  
11 change in circumstances peculiar to the company and the pending case, making it  
12 necessary that there be a departure from established method.” *Hobbs*, 1993-NMSC-  
13 032, ¶ 8 (quoting *Gen. Tel. Co. of the Sw. v. Corp. Comm’n (In re Gen. Tel. Co. of the*  
14 *Sw.)*, 1982-NMSC-106, ¶ 29, 98 N.M. 749, 652 P.2d 1200). In prior cases, the  
15 Commission has considered whether expenditures were prudently incurred and  
16 whether the asset is used-and-useful in providing service when determining the  
17 ratemaking treatment of expenditures on utility plants. *Pub Serv. Co. of N.M. (PNM)*,  
18 101 P.U.R. 4th 126, 149-53 (N.M. Pub. Serv. Comm’n 1989). “The prudent



1 investment theory provides that ratepayers are not to be charged for negligent,  
2 wasteful or improvident expenditures, or for the cost of management decisions which  
3 are not made in good faith.” *Id.* at 151. “To be considered ‘used and useful,’ [a]  
4 property must either be used, or its use must be forthcoming and reasonably certain;  
5 and it must be useful in the sense that its use is reasonable and beneficial to the  
6 public.” *Id.* at 162.

7 {22} After considering the evidence in this case, the hearing examiner concluded  
8 that PNM’s decisions to renew the five leases and repurchase the 64.1 MW were  
9 imprudent because, *inter alia*, PNM failed to demonstrate that it “reasonably  
10 examined alternative courses of action.” Finding PNM’s decisions imprudent, the  
11 hearing examiner recommended that the Commission fully deny PNM recovery for  
12 all the costs attributed to renewing the five leases and repurchasing the 64.1 MW.

13 {23} The Commission adopted the hearing examiner’s conclusion that PNM’s  
14 decisions were imprudent on the basis that PNM had failed to demonstrate that it  
15 considered alternative courses of action. The Commission further adopted the hearing  
16 examiner’s separate finding that PNM had failed to establish that it paid fair market  
17 value for the repurchased 64.1 MW, as required by the prior authorizations in Case  
18 Nos. 1995 and 2019. However, the Commission rejected the total cost disallowance

1 recommended by the hearing examiner and instead imposed alternative remedies for  
2 PNM's imprudence.

3 {24} With regard to PNM's repurchase of the 64.1 MW, the Commission denied  
4 PNM's request to recover for that capacity at \$2,550/kW and instead allowed PNM  
5 to "bring the [64.1 MW] into the rate base at a reasonable value based on [its] net  
6 book value" of \$1,306/kW. For the renewed leases, the Commission allowed PNM  
7 to fully recover its costs because "the amount of those lease renewals was known to  
8 the Commission at the time it approved the lease transaction in that the terms of the  
9 leases expressly stated that the leases would be renewed at [fifty percent of the  
10 original cost]." The Commission further concluded that because PNM's decisions in  
11 "renewing and reacquiring the leases . . . exposed ratepayers to costs associated with  
12 [nuclear] decommissioning responsibilities that likely would not have been incurred  
13 had an alternative resource other than nuclear been selected . . . the appropriate  
14 remedy to protect ratepayers from the effect of PNM's imprudence is to shift the  
15 future burden of [nuclear] decommissioning related costs from the ratepayers to  
16 PNM." Finally, the Commission denied PNM separate recovery of the \$49 million for  
17 leasehold and common plant improvements because the recovery of the \$1,306/kW  
18 net book value included the value of those improvements.

1 {25} The Commission’s final order on Palo Verde is challenged by several parties  
2 on various grounds, which we address as follows. In Section A, we address PNM’s  
3 challenges to the Commission’s finding that PNM failed to demonstrate that its  
4 decisions to retain the Palo Verde assets were prudent. In Section B, we address  
5 PNM’s, NEE’s, and ABCWUA’s various challenges to the Commission’s chosen  
6 remedies for PNM’s imprudence. In Section C, we address PNM’s arguments  
7 regarding the Commission’s denial of a separate recovery for the leasehold  
8 improvements to the 64.1 MW. Finally, in Section D, we address ABCWUA’s  
9 argument that the Commission’s decisions on Palo Verde were made in violation of  
10 its rights to due process of law.

11 **A. The Commission’s Determination of Imprudence Was Lawful and**  
12 **Reasonable**

13 {26} PNM challenges the Commission’s conclusion that the repurchase of the 64.1  
14 MW and the lease renewals were imprudent on three grounds. First, PNM argues that  
15 it was unreasonable for the Commission to even consider the prudence of its  
16 decisions regarding Palo Verde. Second, PNM argues that the Commission departed  
17 from the established prudence standard by requiring PNM to demonstrate that the  
18 repurchased 64.1 MW and the five renewed leases were PNM’s “least cost

1 alternatives.” Third, PNM asserts that the Commission’s finding of imprudence was  
2 arbitrary and capricious, contrary to law, and not supported by substantial evidence.

3 We address each argument in turn.

4 **1. The Commission’s review of PNM’s prudence was not contrary to its prior**  
5 **orders authorizing PNM to retain the Palo Verde assets**

6 {27} PNM argues that it was not required to demonstrate the prudence of its  
7 decisions to repurchase the capacity or renew the leases at Palo Verde because these  
8 actions were previously authorized by the Commission in Case Nos. 1995 and 2019.  
9 Specifically, PNM contends that its decisions were made in reliance on these prior  
10 authorizations, which PNM claims the Commission has now disregarded without  
11 notice. We disagree.

12 {28} In Case Nos. 1995 and 2019, the Commission granted PNM authority to  
13 exercise its options to either renew the leases or repurchase the capacity in  
14 accordance with the terms of the leases. We agree with the Commission that these  
15 prior authorizations relieved PNM of its obligation to obtain permission to retain the  
16 Palo Verde capacity but did not, as PNM contends, relieve PNM from establishing  
17 that its decisions to do so were prudent. *See* NMSA 1978, § 62-6-12(A)(4) (1989)  
18 (“With the prior express authorization of the commission, but not otherwise . . . any

1 public utility may sell, lease, rent, purchase or acquire any public utility plant or  
2 property constituting an operating unit or system or any substantial part thereof[.]”).  
3 In both Case Nos. 1995 and 2019, the Commission retained full ratemaking authority  
4 over Palo Verde, including “the authority to disallow any or all of the lease expenses  
5 and transaction costs on a used-and-useful basis, on the basis of imprudency in the  
6 cost of the Facilities, or on any other lawful basis[.]” Such a clear and unequivocal  
7 reservation of authority was sufficient to put PNM on notice that the Commission  
8 would indeed consider whether PNM’s decisions at Palo Verde were prudent for  
9 purposes of ratemaking and that PNM would have the burden of making that  
10 showing. We conclude that PNM was required to demonstrate its prudence regarding  
11 Palo Verde, regardless of the Commission’s prior authorizations in Case Nos. 1995  
12 and 2019.

13 **2. The Commission did not depart from the established standard of prudence**

14 {29} In her recommended decision, the hearing examiner expressed the prudence  
15 standard this Court previously recognized in *PNM Gas Services*, 2000-NMSC-012,

16 ¶ 63. Quoting Case No. 2087, the hearing examiner stated:

17 Prudence is that standard of care which a reasonable person would be  
18 expected to exercise under the same circumstances encountered by  
19 utility management at the time decisions had to be made. In determining

1 whether a judgment was prudently made, only those facts available at  
2 the time judgment was exercised can be considered. Hindsight review  
3 is impermissible.

4 Imprudence cannot be sustained by substituting one's judgment for that  
5 of another. The prudence standard recognizes that reasonable persons  
6 can have honest differences of opinion without one or the other  
7 necessarily being "imprudent."

8 {30} PNM does not disagree with the prudence standard articulated above, but rather  
9 contends that the Commission departed from that established prudence standard in  
10 its application by focusing entirely on whether PNM demonstrated that the  
11 repurchased 64.1 MW and the five renewed leases were PNM's "least cost  
12 alternatives." See *PNM Gas Servs.*, 2000-NMSC-012, ¶ 9 ("[T]he Commission is not  
13 free to disregard its own rules and prior ratemaking decisions or to change its position  
14 without good cause and prior notice to the affected parties." (internal quotations and  
15 citation omitted)). PNM's argument is unpersuasive.

16 {31} The hearing examiner concluded that PNM was imprudent because, *inter alia*,  
17 a reasonable person under the circumstances faced by PNM's management would  
18 have adequately considered alternatives to retaining the Palo Verde assets. The  
19 Commission adopted this conclusion by reference. By requiring PNM to demonstrate  
20 that its management adequately considered alternatives when it decided to repurchase

1 the 64.1 MW and renew the five leases, the hearing examiner and Commission  
2 reasonably applied the prudence standard to PNM's decisions.

3 {32} We pause, before concluding our analysis of this argument, to note that it was  
4 not inappropriate for the Commission to address whether PNM had demonstrated  
5 Palo Verde to be cost-effective or the lowest cost alternative. We observe that there  
6 is a meaningful relationship from the perspective of the ratepayers between the  
7 consideration of alternatives and the cost of the chosen generation resource. The goal  
8 of the consideration of alternatives is, of course, to reasonably protect ratepayers from  
9 wasteful expenditure. *PNM*, 101 P.U.R. 4th at 151. The failure to reasonably consider  
10 alternatives was a fundamental flaw in PNM's decision-making process. *See In re*  
11 *PacifiCorp (PacifiCorp)*, UE 246, Order No. 12-493 at 26-27, 2012 WL 6644237 (Or.  
12 P.U.C. Dec. 20, 2012) (stating, in the context of analyzing a utility's failure to  
13 reasonably consider alternatives, that the decision-making process of the utility is  
14 properly included in the prudence analysis). However, even if a utility company was  
15 imprudent because it failed to prospectively consider alternatives, that imprudence  
16 may be mitigated by a demonstration that the decision of the utility nevertheless  
17 protected ratepayers from excess cost. *See PacifiCorp*, UE 246, Order No. 12-493 at  
18 26, 2012 WL 6644237 ("It is possible that the utility may be able to present sufficient

1 information from external sources . . . to establish that its ultimate decision was  
2 prudent—regardless of what internal decision-making process was used[.]”).  
3 Conversely, even if a utility reasonably considered alternatives but then chose to  
4 pursue an unreasonable alternative, the consideration of alternatives may be  
5 insufficient. *Cf. id.* (stating that although the prudent investment standard does not  
6 require optimal results, it does require that the utility’s action was objectively  
7 reasonable). In the context of the case before us, we need not and do not fully address  
8 these issues. We therefore conclude that the Commission did not apply a new “least  
9 cost alternative” test without notice, as PNM contends, but instead reasonably applied  
10 the prudence standard previously established by the Commission and recognized by  
11 this Court.

12 **3. The Commission’s finding of imprudence is supported by substantial**  
13 **evidence in the record**

14 {33} We next address PNM’s argument that the Commission’s finding of  
15 imprudence is not supported by substantial evidence. In the proceedings before the  
16 hearing examiner, PNM called a number of witnesses to testify that its decisions to  
17 repurchase 64.1MW of capacity and renew the five leases were prudent. PNM  
18 witnesses Gerard Ortiz and Elisabeth Eden both testified that retaining its Palo Verde



1 assets after the termination of the original leases had long been part of PNM's  
2 planning and strategy. Regarding the benefits of retaining its Palo Verde capacity,  
3 Ortiz testified that Palo Verde is a "zero emission plant" with a "strong performance  
4 record" and is "PNM's lowest cost resource from an economic dispatch perspective."  
5 Ortiz also testified that PNM's decisions to renew the leases and repurchase the 64.1  
6 MW were consistent with its Integrated Resource Plans (IRPs)<sup>1</sup> filed in 2008 and  
7 2011. However, on cross examination, Ortiz could not recall if the 2008 IRP analyzed  
8 the repurchase of the 64.1 MW and stated "that the 2011 IRP is really the relevant  
9 document." Ortiz additionally could not recall the price inputs for natural gas or solar  
10 used in PNM's modeling for the 2011 IRP.

11 {34} To counter PNM's reliance on its 2011 IRP, NMIEC witness James Dauphinais  
12 testified that the IRP process did not conduct an analysis which would "determine  
13 whether allowing the leases to terminate, renewing the leases or purchasing the leases  
14 at fair market value was the most cost-effective resource option with respect to those  
15 leases." Dauphinais testified that the 2011 IRP instead ran an analysis which assumed

---

16 <sup>1</sup>An IRP is a document electric utilities must file periodically with the  
17 Commission, *see* 17.7.3.9 NMAC, that, *inter alia*, should seek to identify resource  
18 options and determine the "most cost effective resource portfolio and alternative  
19 portfolios[.]" 17.7.3.9(B)(4), (7) NMAC.

1 that all of the Palo Verde leases would expire in 2020 and compared a scenario in  
2 which PNM renewed all the leases at their previous cost with a scenario in which  
3 PNM replaced the 178 MW of leased Palo Verde Capacity with a 252 MW combined  
4 cycle gas turbine generation plant. The results of this analysis revealed that the option  
5 of replacing the Palo Verde capacity with the gas plant would cost an estimated \$51  
6 million more than renewing the leases. According to Dauphinais, this analysis did not  
7 include the option of repurchasing any of the leased capacity at fair market value.

8 {35} PNM witness Ortiz confirmed that the 2011 IRP did not examine the option of  
9 purchasing the leased Palo Verde capacity and, in an answer to an interrogatory, PNM  
10 stated that it “had not performed any Strategist<sup>2</sup> runs, economic modeling, or financial  
11 analysis with respect to the acquisition of the interest in Palo Verde [Unit 2] at the  
12 valuation cited.” Moreover, on cross examination, Ortiz agreed that PNM had not  
13 submitted any quantitative analysis in this proceeding regarding the benefits of  
14 renewing the five leases, relying instead on the 2011 IRP.

---

15 <sup>2</sup>The hearing examiner described Strategist as follows: “PNM uses Strategist,  
16 a computer software tool, to rank portfolios. Strategist can consider alternative  
17 resource portfolios with the goal of identifying through an optimization algorithm the  
18 most cost effective combination of resources as measured by [net present value]. It  
19 varies its assumptions, *i.e.*, cost of fuel, carbon costs, through sensitivity analyses.  
20 Strategist determines whether PNM needs resources and recommends the most cost-  
21 effective portfolio to serve load over 20 years.”

1 {36} Given this evidence, the hearing examiner focused her analysis of PNM’s  
2 prudence on the 2011 IRP as the relevant IRP at the time PNM made the decisions  
3 at issue. The hearing examiner concluded that the 2011 IRP failed to demonstrate  
4 PNM’s prudence because, *inter alia*, it “did not test extension of the leases and  
5 purchases of the 64.1 MW against a wide range of futures/scenarios and input  
6 assumptions.” The evidence in the record is sufficient to support this finding.  
7 Although Ortiz testified that the 2011 IRP demonstrated PNM’s prudence, “[t]he  
8 Commission is not bound by the opinions of experts so long as the Commission’s  
9 ultimate decision is supported by substantial evidence.” *Att’y Gen. of N.M. v. N.M.*  
10 *Pub. Serv. Comm’n*, 1984-NMSC-081, ¶ 15, 101 N.M. 549, 685 P.2d 957. The  
11 conflicting testimony of Dauphinais regarding the 2011 IRP supports the hearing  
12 examiner’s findings. *See id.* ¶ 12 (“[E]vidence of two conflicting opinions in the  
13 record does not mean that the decision arrived at is unsupported by substantial  
14 evidence.”). Viewing the record in the light most favorable to the decision, we  
15 conclude there is substantial evidence to support the hearing examiner’s  
16 determination that PNM failed to adequately consider alternatives to renewing the  
17 leases and repurchasing the 64.1 MW. *See NMIEC*, 2007-NMSC-053, ¶ 24.

18 {37} PNM also challenges the Commission’s conclusions that PNM could not rely

1 on the 2011 IRP to demonstrate its prudence because that IRP had not been admitted  
2 into evidence and had not been expressly accepted as compliant with the IRP rules  
3 in a previous case. We need not address these arguments because, regardless of  
4 whether the 2011 IRP was accepted as compliant or admitted into the record,  
5 substantial evidence in the record supports the hearing examiner’s determination that  
6 the 2011 IRP “did not test extension of the leases and purchase of the 64.1 MW  
7 against a wide range of futures/scenarios and input assumptions.” This finding was  
8 not modified or rejected by the Commission.

9 {38} For the foregoing reasons, we hold that the Commission’s determination that  
10 PNM’s decisions were imprudent was supported by substantial evidence, was not  
11 arbitrary or capricious, was not contrary to law, and was thus lawful and reasonable.  
12 We must next consider whether the Commission’s remedies for PNM’s imprudence  
13 were reasonable and lawful.

14 **B. The Commission’s Remedy Limiting Recovery for the Palo Verde Assets**  
15 **Was Lawful and Reasonable but the Denial of All Future Nuclear**  
16 **Decommissioning Costs Was Unlawful**

17 {39} Under the prudent investment theory, “ratepayers are not to be charged for  
18 negligent, wasteful or improvident expenditures, or for the cost of management  
19 decisions which are not made in good faith.” *PNM*, 101 P.U.R. 4th at 151. Finding

1 imprudence, the hearing examiner in this case recommended that the Commission  
2 disallow all recovery for the cost of the five renewed leases and the value of the  
3 repurchased 64.1 MW. However, the Commission rejected a total disallowance as its  
4 only option and instead relied on the approach taken by the Oregon Public Utility  
5 Commission (Oregon PUC) in *PacifiCorp*, UE 246, Order No. 12-493, 2012 WL  
6 6644237 as a persuasive example of a commission finding imprudence but  
7 disallowing only a portion of the utility’s expenses.

8 {40} Similar to the finding of imprudence in this case, the Oregon PUC in  
9 *PacifiCorp* found that the utility had acted imprudently by not considering  
10 alternatives to its chosen environmental compliance measures. *Id.* at 17, 28. The  
11 Oregon PUC concluded that “[b]ecause the purpose of a prudence review is to hold  
12 ratepayers harmless from any amount imprudently invested, a disallowance should  
13 equal the amount of the unreasonable investment.” *Id.* at 31. However, the Oregon  
14 PUC faced a challenge in calculating how much to disallow:

15       Quantifying the impact of [the utility’s] imprudence has been hindered  
16       by the very actions that underlie our finding of imprudence—the  
17       utility’s inadequate analysis and decision-making. Had [the utility]  
18       reasonably considered other compliance alternatives and performed  
19       proper and robust analyses, we would have the information necessary to  
20       calculate the harm to ratepayers for the utility’s decision to proceed with  
21       its investments rather than pursuing other, least-costly, options. Without

1 that information, we are left with determining a disallowance that  
2 reasonably penalizes [the utility] for its imprudence, while  
3 acknowledging our inability to assess a precise amount.

4 *Id.* Considering its options, the Oregon PUC rejected the argument of an intervenor  
5 that the utility’s costs should be fully disallowed and instead determined that a partial  
6 disallowance of ten percent was an appropriate remedy. *Id.* at 31-32.

7 {41} The Oregon PUC reasoned that its imprecise remedy was consistent with  
8 general ratemaking principles because “[t]he economic judgments required in rate  
9 proceedings are often hopelessly complex and do not admit [of] a single correct  
10 result.” *Id.* at 32 (first alteration in original) (quoting *Duquesne Light Co. v. Barasch*,  
11 488 U.S. 299, 314 (1989)). The Oregon PUC further concluded that its chosen  
12 remedy was within its discretion to determine a utility’s rate base and explained that  
13 the partial disallowance was “reasonable in relationship to the potential harm to  
14 [ratepayers]” and led to just and reasonable rates. *PacifiCorp*, UE 246, Order No. 12-  
15 493 at 32, 2012 WL 6644237.

16 {42} In this case, the Commission agreed with and adopted the approach applied in  
17 *PacifiCorp* that the proper remedy for a utility’s imprudence “should equal the  
18 amount of the unreasonable investment” in order to “hold ratepayers harmless from  
19 any amount imprudently invested[.]” *Id.* at 31. Accordingly, the Commission did not

1 deny PNM all recovery for the Palo Verde assets and, instead, crafted what it  
2 considered to be reasonable remedies intended to protect ratepayers. We address the  
3 approach taken by the Commission in this regard.

4 **1. The Commission’s remedy limiting PNM’s recovery to the net book value**  
5 **of \$1,306/kW for the repurchased 64.1 MW and the cost of the renewed**  
6 **leases is reasonable and lawful**

7 {43} In its final order, the Commission found that the Palo Verde assets “had always  
8 been certificated capacity and long been found to be used and useful” and concluded  
9 that the prior authorizations in Case Nos. 1995 and 2019 allowing PNM to retain that  
10 Palo Verde capacity demonstrated an intent that Palo Verde would continue to be  
11 used to serve New Mexico ratepayers. Moreover, the Commission noted that multiple  
12 parties supported the finding of imprudence yet still recommended that the  
13 Commission allow recovery for the Palo Verde assets at a reasonable valuation. In  
14 particular, NMIEC and Western Resource Advocates (WRA) argued that Palo Verde  
15 is an asset valuable to PNM’s customers and that the Commission should determine  
16 a reasonable valuation for both the repurchased 64.1 MW and the five renewed  
17 leases.

18 {44} With respect to the repurchased 64.1 MW, the Commission noted that the prior  
19 authorizations reserved its authority “to disallow recovery of [PNM’s Palo Verde]

1 costs to the extent found to be imprudent” and limited PNM to a repurchase at fair  
2 market value. The Commission found that PNM had failed to demonstrate its  
3 prudence and had also failed to demonstrate that it paid a fair market value for the  
4 64.1 MW. Therefore, the Commission determined that an appropriate remedy, which  
5 would protect ratepayers from PNM’s failure to consider alternatives to Palo Verde,  
6 would be to disallow recovery for the amount PNM paid for the 64.1 MW over the  
7 net book value of that capacity. The Commission considered the evidence presented  
8 and determined that the net book value of \$1,306/kW was a reasonable value for the  
9 capacity and allowed PNM to bring the 64.1 MW into its rate base at that amount.

10 {45} With respect to the five renewed leases, the Commission noted that when it  
11 issued the prior authorizations granting PNM authority to renew the leases according  
12 to their terms it knew those terms specified that the leases would be renewed at fifty  
13 percent of the original cost. Accordingly, the Commission allowed PNM to recover  
14 the costs of the five renewed leases.

15 {46} The Commission’s treatment of the 64.1 MW and the renewed leases in this  
16 ratemaking case was necessarily imprecise because, as in *PacifiCorp*, the very  
17 behavior that caused the need for a remedy—PNM’s failure to consider  
18 alternatives—impaired the Commission’s ability to quantify the potential harm to



1 ratepayers from PNM’s imprudence. *See PacifiCorp*, UE 246, Order No. 12-493 at  
2 31, 2012 WL 6644237 (“Quantifying the impact of [the] imprudence has been  
3 hindered by the very actions that underlie our finding of imprudence—the utility’s  
4 inadequate analysis and decision-making.”). Despite this, the Commission established  
5 valuations for the 64.1 MW and the renewed leases which it considered appropriate  
6 to protect ratepayers and result in just and reasonable rates. Such an approach is a  
7 lawful and reasonable exercise of the Commission’s authority to determine the rate  
8 base of a utility under Section 62-6-14(A) and its obligation to ensure that rates are  
9 just and reasonable under Section 62-8-1.

10 {47} We recognize NEE’s and ABCWUA’s concerns that a utility should not be  
11 rewarded for its imprudent failure to reasonably consider alternatives and  
12 acknowledge that total disallowance may be an appropriate remedy for such  
13 imprudence in some circumstances. *See PacifiCorp*, UE 246, Order No. 12-493 at 31,  
14 2012 WL 6644237 (acknowledging the possibility of a full disallowance while  
15 concluding that “a disallowance should equal the amount of the unreasonable  
16 investment”). Under the particular facts and circumstances of this case, the  
17 Commission’s decisions were reasonably made with due consideration of the unique  
18 regulatory history of this Palo Verde capacity and the arguments of several parties

1 that Palo Verde provides significant value to ratepayers. Accordingly, it was  
2 reasonable and lawful for the Commission to conclude that a total disallowance was  
3 not justified in this case.

4 {48} Several parties raise specific challenges to the Commission's chosen valuations  
5 of the Palo Verde assets. PNM challenges the Commission's denial of full recovery  
6 of the \$2,550/kW purchase price for the 64.1 MW. On the other hand, NEE and  
7 ABCWUA contend that PNM is not entitled to any recovery for the Palo Verde  
8 assets. Considering both perspectives, we conclude that neither PNM nor NEE and  
9 ABCWUA have met their burden under Section 62-11-4 of showing that the  
10 Commission's determination to limit PNM's recovery to the net book value for the  
11 64.1 MW and to recover the cost of the renewed leases was unreasonable or unlawful.

12 {49} PNM claims that its purchase of the 64.1 MW was the result of an arm's-length  
13 transaction, negotiated following the procedures approved by the Commission in  
14 Case Nos. 1995 and 2019, and benefitted ratepayers by providing cost-effective,  
15 reliable, and carbon-free power. PNM therefore contends that it was entitled the entire  
16 purchase price of \$2,550/kW for the 64.1 MW as an acquisition adjustment. *See*  
17 *Hobbs*, 1980-NMSC-005, ¶ 12 (holding that the Commission erred when it denied a  
18 utility recovery of an acquisition adjustment where the purchase was the result of an

1 arm's-length transaction and the purchase benefitted ratepayers because the price was  
2 less than the appraised value). PNM further claims that its purchase price was a fair  
3 market value for that capacity. We disagree.

4 {50} First, the Commission found that PNM failed to demonstrate that its purchase  
5 price for the 64.1 MW was a fair market value for that capacity. Pursuant to the lease  
6 provisions, PNM did not obtain an appraisal of the 64.1 MW and instead negotiated  
7 the purchase price with the lessors. Absent an appraisal, PNM relied on evidence of  
8 sales or valuations of other Palo Verde assets to support its negotiated purchase price  
9 of \$2,550/kW. This evidence included: Palo Verde capacity purchased by PNM at a  
10 2007 auction and given a rate base valuation of \$2,549/kW; PNM's failed bid of  
11 \$2,578/kW in a 2011 auction for Palo Verde capacity; and an appraisal submitted by  
12 PNM in Case No. 13-00390-UT showing a value of \$2,500/kW for the Palo Verde  
13 capacity PNM sought approval for in that case.

14 {51} The hearing examiner rejected PNM's reliance on these previous sales and  
15 valuations, finding that (1) the 2007 purchase was not sufficiently contemporaneous  
16 because it was approved six years before PNM entered into the agreements to  
17 repurchase the 64.1 MW and PNM witness Eden admitted on cross-examination that  
18 energy markets had changed since that time; (2) the 2011 auction was not sufficiently

1 comparable because it only involved a beneficial interest in that particular capacity,  
2 which would not include the “risks of typical ownership, such as [operation and  
3 maintenance costs], decommissioning costs, and costs of capital improvements”; and  
4 (3) the hearing examiner in Case No. 13-00390-UT had criticized the appraisal in that  
5 case and had recommended that it not be accepted to support PNM’s proposed value  
6 for that capacity. In its final order, the Commission adopted the hearing examiner’s  
7 findings regarding the “timing and comparability” of the sales and valuations relied  
8 upon by PNM. Viewing the entire record in the light most favorable to the  
9 Commission’s decision, we conclude that there is substantial evidence to support the  
10 Commission’s determination that PNM’s reliance on these other sales and valuations  
11 failed to demonstrate that the \$2,550/kW it paid to acquire the 64.1 MW at Palo  
12 Verde was a fair market value. *See NMIEC, 2007-NMSC-053, ¶ 24.*

13 {52} Second, PNM’s argument that it was entitled to an acquisition adjustment  
14 under *Hobbs, 1980-NMSC-005, ¶ 2* ignores the central issue facing the  
15 Commission—how to protect ratepayers from PNM’s failure to consider alternatives  
16 to retaining the 64.1 MW. PNM fails to address how the Commission’s remedy for  
17 PNM’s imprudent decision-making process was unreasonable or without a rational  
18 basis. Accordingly, we conclude that PNM has not demonstrated that the

1 Commission’s remedy was arbitrary or capricious. *See Rio Grande Chapter of Sierra*  
2 *Club*, 2003-NMSC-005, ¶ 17.

3 {53} We next address NEE and ABCWUA’s various arguments that the  
4 Commission’s decision to grant recovery for the Palo Verde expenditures was not  
5 supported by substantial evidence and was contrary to prior Commission decisions.  
6 We are not persuaded by these arguments for the reasons set forth below.

7 {54} First, NEE and ABCWUA both contend that the Commission’s used-and-useful  
8 determination is not supported by substantial evidence. The Commission has  
9 previously defined the used-and-useful standard to require that an asset is used or  
10 soon to be used and “its use is reasonable and beneficial to the public.” *PNM*, 101  
11 P.U.R. 4th at 162. The used-and-useful standard additionally recognizes a utility’s  
12 obligation to “provide efficient and economical service.” *Id.* In this case, the  
13 Commission noted that the prior authorizations in Case Nos. 1995 and 2019 indicated  
14 an intention that the Palo Verde resources would continue to serve ratepayers.  
15 Additionally, PNM witnesses testified that Palo Verde is “a cost-effective and reliable  
16 generation resource” that provides PNM with base load generation. These witnesses  
17 testified that Palo Verde is carbon emission free and contributes to PNM’s fuel  
18 diversity. Viewed in the light most favorable to the Commission’s decision, this

1 evidence is sufficient for a reasonable mind to conclude that Palo Verde Units 1 and  
2 2 are used-and-useful. *See NMIEC, 2007-NMSC-053, ¶ 24.*<sup>3</sup>

3 {55} We also reject NEE and ABCWUA's argument that the Commission's  
4 \$1,306/kW valuation for the 64.1 MW, based on the net book value of that capacity,  
5 was not supported by substantial evidence in the record. Because PNM had been  
6 leasing Palo Verde Unit 2, it was necessary to recreate a net book value for the unit.  
7 PNM originally proposed a net book value of \$1,596/kW but later in the proceedings  
8 revised this value and proposed a net book value of \$1,306/kW. PNM witness Jason  
9 Peters testified in support of this revised net book value with calculations including  
10 the cost basis for each of the Palo Verde Unit 2 leases from the original sales and the  
11 value of the capital investments and common plant assets at Palo Verde. After  
12 considering net book values proposed by other parties, the Commission found that  
13 PNM's proposed net book value of \$1,306/kW was appropriate. We conclude that  
14 this determination involving the Commission's technical expertise is supported by

---

15 <sup>3</sup>On appeal, the parties disagree as to whether a stipulated to used-and-useful  
16 finding for Palo Verde Units 1 and 2 from Case No. 2567 is still in effect or whether  
17 PNM had the burden in this case to demonstrate that those units are currently used-  
18 and-useful. Whether that stipulation is still in effect is not critical to our analysis  
19 because the Commission's finding that Palo Verde Units 1 and 2 are used-and-useful  
20 is supported by substantial evidence.

1 substantial evidence in the record. *See ABCWUA, 2010-NMSC-013, ¶ 50.*

2 {56} We next consider NEE and ABCWUA's arguments that the Commission's  
3 decision to allow recovery for PNM's Palo Verde expenditures was contrary to its  
4 prior ratemaking decisions. The Commission rejected these arguments, determining  
5 that its prior authorizations in Case Nos. 1995 and 2019 indicated an intent to provide  
6 PNM with an opportunity to retain the Palo Verde capacity and potentially include  
7 the cost of doing so in its rates. This conclusion was reasonable and lawful and we  
8 therefore reject the arguments made by NEE and ABCWUA for the reasons stated  
9 below.

10 {57} NEE and ABCWUA both rely on Case No. 2444 to contend that the  
11 Commission intended to bring the Palo Verde capacity into the rate base at \$0. This  
12 reliance is misplaced. In Case No. 2444 the Commission decided that other leased  
13 Palo Verde capacity, repurchased by PNM outside the terms of the original leases,  
14 would be brought back into the rate base at \$0 at the end of the original lease term.  
15 Case No. 2444 involved different capacity, repurchased by PNM in a different  
16 manner, and therefore does not render the Commission's decision regarding this  
17 capacity arbitrary and capricious. For these reasons, we also reject NEE's additional  
18 arguments which similarly rely on Case No. 2444 and other ratemaking cases

1 involving the repurchase of Palo Verde capacity outside of the terms of the original  
2 leases.

3 {58} ABCWUA also contends that because the Commission equated the original  
4 lease payments with capital costs in prior rate cases and PNM has recovered those  
5 payments as operating and maintenance costs, it is contrary to those prior ratemaking  
6 decisions and contrary to law for the Commission to allow PNM to recover its Palo  
7 Verde costs in this case. *See Moyston v. N.M. Pub. Serv. Comm'n*, 1966-NMSC-062,  
8 ¶ 18, 76 N.M. 146, 412 P.2d 840 (“[W]here prior capital investments were charged  
9 to operating expenses and the rate apparently fixed on that basis, a utility cannot later  
10 capitalize such amounts in determining original cost for rate making purposes.”). We  
11 are not persuaded by this argument because, regardless of how PNM previously  
12 recovered its prior lease costs, in this case it sought recovery for new costs associated  
13 with the renewal of the five leases and the repurchase of the 64.1 MW.

14 {59} For the foregoing reasons, we conclude that the Commission’s decision  
15 authorizing PNM to recover the \$1,306/kW net book value for the repurchased 64.1  
16 MW as well as the cost of the five renewed leases is in accordance with the law,  
17 supported by substantial evidence, and not arbitrary and capricious. However, the  
18 Commission’s decision on PNM’s imprudence did not end there. In its final order, the



1 Commission noted that PNM’s “actions in renewing and reacquiring the leases have  
2 exposed ratepayers to costs associated with [nuclear] decommissioning  
3 responsibilities that likely would not have been incurred had an alternative resource  
4 other than nuclear been selected” and concluded that “the appropriate remedy to  
5 protect ratepayers from the effect of PNM’s imprudence is to shift the future burden  
6 of decommissioning related costs from the ratepayers to PNM.” We turn now to  
7 consider PNM’s challenges to this determination.

8 **2. It was a violation of PNM’s right to due process of law to deny recovery**  
9 **for all future nuclear decommissioning costs**

10 {60} At the end of the useful lives of the Palo Verde units, the Nuclear Regulatory  
11 Commission and the Palo Verde participation agreement require the decommissioning  
12 of those units. Under the terms of the original leases, PNM was responsible for all of  
13 the nuclear decommissioning costs associated with the Palo Verde capacity it leased.  
14 Whether or not it had renewed the leases or repurchased the 64.1 MW, PNM would  
15 have remained responsible for the same share of these decommissioning costs.  
16 However, the Commission has not previously determined whether ratepayers would  
17 be responsible for decommissioning costs for any period that Palo Verde Units 1 and  
18 2 are not owned or leased by PNM. To reserve funds for these costs, PNM maintains

1 nuclear decommissioning trusts and has previously recovered its contributions to  
2 these trusts in its rates.

3 {61} The hearing examiner found that the decommissioning trusts for Palo Verde  
4 Units 1 and 2 are completely or almost completely funded and recommended that  
5 PNM currently cease contributing to the trusts and collecting those costs from  
6 ratepayers. The hearing examiner also recommended that PNM be given an  
7 opportunity to reinstate rate recovery for contributions to the trusts if it appears in the  
8 future that the funds will be insufficient. However, the Commission determined that  
9 part of the “appropriate remedy to protect the ratepayers from the effect of PNM’s  
10 imprudence” included “shift[ing] the future burden of decommissioning related costs  
11 from the ratepayers to PNM” and concluded that “[i]n the event additional funding  
12 is required, PNM shall bear those expenses without recovery from ratepayers.”

13 {62} PNM appeals this decision, arguing that it was not supported by substantial  
14 evidence in the record, was contrary to prior Commission practice, and that the  
15 Commission violated PNM’s right to due process of law by making this decision  
16 without providing PNM notice and an opportunity to be heard. Because we conclude  
17 that the Commission violated PNM’s right to due process, we do not reach PNM’s  
18 other arguments.

1 {63} “It is well settled that the fundamental requirements of due process in an  
2 administrative context are reasonable notice and opportunity to be heard and present  
3 any claim or defense.” *ABCWUA*, 2010-NMSC-013, ¶ 21 (quoting *Jones v. N.M.*  
4 *State Racing Comm’n*, 1983-NMSC-089, ¶ 6, 100 N.M. 434, 671 P.2d 1145). To  
5 argue that PNM was on notice that the disallowance of decommissioning costs was  
6 at issue, the Commission relies on the recommendation of the hearing examiner to  
7 deny, for the time being, recovery for contributions to the trusts. However, that  
8 recommendation did not address the permanent disallowance of recovery. The  
9 hearing examiner adopted the recommendation of ABCWUA witness James Dittmer,  
10 who acknowledged that it is possible that the nuclear decommissioning trusts will not  
11 be adequately funded at the retirement of the Palo Verde units and fully expected  
12 PNM to be able to later request rate recovery for its decommissioning costs. The  
13 hearing examiner’s recommendation, along with the testimony on which it was based,  
14 was limited to the temporary disallowance of recovery and did not provide PNM with  
15 notice of a permanent disallowance of recovery for its contributions to the nuclear  
16 decommissioning trusts.

17 {64} The Commission additionally argues that PNM was on notice regarding the  
18 issue of permanent disallowance of recovery for decommissioning costs because all

1 expenses a utility seeks to recover in its rates are subject to review in accordance with  
2 the Commission's obligation to ensure that rates are "just and reasonable" under  
3 Section 62-8-1. However, the Commission has previously recognized that "it would  
4 be burdensome to require a utility to justify every expenditure which is the basis of  
5 the request for rate relief" and that, therefore, the Commission assumes that an  
6 expense was reasonably incurred unless it is challenged. *PNM Gas Servs.*, 2000-  
7 NMSC-012, ¶ 72 (quoting *Pub. Serv. Co.*, 50 P.U.R. 4th 416, 427 (N.M. Pub. Serv.  
8 Comm'n 1982)). As we have discussed, ABCWUA witness Dittmer challenged  
9 PNM's current recovery for its decommissioning costs but acknowledged that PNM  
10 would be able to later request recovery should the need arise.

11 {65} We are unconvinced that the challenge to PNM's current recovery for its  
12 decommissioning costs or the obligation of the Commission to ensure that rates are  
13 "just and reasonable" provided PNM with notice of a potential permanent  
14 disallowance of all recovery for its future contributions to the nuclear  
15 decommissioning trusts. Because the issue of a permanent disallowance of recovery  
16 for contributions to the nuclear decommissioning trusts appears to have been first  
17 raised by the Commission in its final order, PNM was not afforded an opportunity to  
18 be heard on the issue. Accordingly, we conclude that the Commission's decision to

1 disallow recovery of any future decommissioning costs as a remedy for PNM's  
2 imprudence deprived PNM of its right to due process of law.

3 **C. It Was Reasonable and Lawful for the Commission to Deny PNM Separate**  
4 **Recovery for the Leasehold Improvements**

5 {66} Under the terms of the original leases, PNM was responsible for all of the costs  
6 associated with the asset including the lease payments, capital investments, and  
7 operating and maintenance costs. Title to the leasehold improvements would vest in  
8 the lessors rather than with PNM. PNM has previously included the cost of the  
9 leasehold improvements in its rate base, using a Commission approved depreciation  
10 rate based on the federal operating licenses for Palo Verde running through 2046.

11 {67} In its final order, the Commission addressed arguments that PNM would  
12 recover twice for the value of its leasehold improvements if it were able to recover  
13 both the \$1,306/kW net book value and the leasehold improvements separately. The  
14 Commission accepted that the \$1,306/kW net book value included the value of the  
15 leasehold improvements, and denied PNM separate recovery for the \$49 million value  
16 of the improvements. PNM challenges the Commission's denial of a separate  
17 recovery for these costs on the grounds that the Commission's decision unreasonably  
18 departs from prior Commission practice and is contrary to law. For the reasons that

1 follow, we reject PNM's contentions.

2 {68} First, PNM argues it reasonably relied on prior Commission practice allowing  
3 it to recover for the leasehold improvements past the end of the initial lease terms and  
4 that, by denying separate recovery for the leasehold improvements, the Commission  
5 has disregarded its prior treatment of the improvements. *See Hobbs*, 1993-NMSC-  
6 032, ¶ 9. We conclude that, under the Commission's broad ratemaking authority  
7 under Section 62-6-14, it was reasonable and lawful for the Commission to find that  
8 PNM's proposed net book value included the value of the leasehold improvements  
9 and common plant assets and that recovery of the \$1,306/kW net book value would  
10 include recovery for those leasehold improvements. Because PNM will continue to  
11 recover the value of its leasehold improvements through its net book value, it was not  
12 contrary to the Commission's prior practice for it to disallow PNM to recover for the  
13 leasehold improvements separately.

14 {69} Second, PNM contends that the Commission's decision to include recovery of  
15 the leasehold improvements in the recovery of the net book value is contrary to the  
16 holdings of both *Cruzan v. Franklin Stores Corp.*, 1963-NMSC-056, 72 N.M. 42, 380  
17 P.2d 190 and *Board of Education v. Thunder Mountain Water Co.*, 2007-NMSC-031,  
18 141 N.M. 824, 161 P.3d 869. Both of these cases are inapposite. In *Cruzan*, this Court

1 concluded that a lessee could not offset his liability to the lessor by the value of  
2 improvements made to the property, especially where the title to the improvements  
3 vested with the lessor by the terms of the lease. 1963-NMSC-056, ¶ 6-8. In *Thunder*  
4 *Mountain*, this Court held that it was not a “double recovery” to require a school  
5 board to pay the fair market value for a utility’s property in a condemnation action  
6 without deducting earlier payments made by the board to the utility to aid in  
7 construction of that property. 2007-NMSC-031, ¶¶ 6-7. Neither of these cases  
8 concern issues related to ratemaking, nor the Commission’s authority to determine  
9 an asset’s value and its obligation to balance the interests of the ratepayers and  
10 shareholders. *See* Section 62-6-14(A); Section 62-3-1(B). Indeed, this Court’s  
11 decision in *Thunder Mountain* was based in large part on the distinction between  
12 standards with respect to ratemaking and those involved in a condemnation action.  
13 2007-NMSC-031, ¶¶ 8-20.

14 {70} We conclude that it was neither contrary to law nor prior Commission practice  
15 for the Commission to allow PNM to recover the value of the leasehold  
16 improvements in the net book value and to disallow PNM to recover the cost of the  
17 leasehold improvements separately.

18 **D. The Commission’s Decision Denying a Request to Reopen the Proceedings**

1           **after Issuing a Bench Request Was Lawful and Not a Violation of**  
2           **ABCWUA’s Due Process Rights**

3 {71}   ABCWUA argues that the Commission violated its own procedural rules and  
4 due process of law by not reopening the proceedings to allow ABCWUA and several  
5 other parties an opportunity to reply to PNM’s response to a bench request. Because  
6 the bench request pertained to the issue of recovery of PNM’s Palo Verde  
7 expenditures, we address ABCWUA’s arguments here.

8 {72}   After the closure of both the initial and supplemental evidentiary hearings, the  
9 hearing examiner issued her initial recommended decision. Commissioner Lyons then  
10 issued a bench request directing PNM to answer questions regarding the potential  
11 financial, maintenance, layoff, and contractual consequences of the hearing  
12 examiner’s recommendation to deny all recovery for the cost of the five renewed  
13 leases and repurchased 64.1 MW. *See* 1.2.2.30(B) NMAC (granting a single  
14 commissioner authority to “issue any procedural orders prior to, during, or after a  
15 public hearing”). NEE filed a motion requesting that the bench request be withdrawn  
16 or, in the alternative, that PNM’s response to the bench request be stricken. The next  
17 day, PNM filed a response to the Commission’s bench request and several parties,  
18 including ABCWUA, jointly filed a motion “oppos[ing] the addition of any new



1 evidence . . . unless the Commission orders the evidentiary portion of this matter  
2 reopened and a hearing on new evidence presented on [PNM's] response," including  
3 additional discovery, cross-examination of witnesses, and the presentation of  
4 response and rebuttal testimony.

5 {73} In its order on these motions, the Commission found that PNM's response  
6 mostly reiterated evidence already in the record but also "include[d] additional  
7 information that ha[d] not previously been admitted into evidence." Stating that it  
8 uses bench requests to investigate whether to reopen the evidentiary proceedings, the  
9 Commission concluded that the "mere request for information does not indicate that  
10 the Commission is considering such information as substantive evidence or constitute  
11 admission of such information into the record." Accordingly, the Commission stated  
12 in its order that it would not reopen the proceedings but would instead "affirmatively  
13 exclud[e from consideration] that information contained in PNM's response to [the  
14 bench request] that is not already part of the record." This reasoning was consistent  
15 with a prior order in this case in which the Commission reopened the proceedings  
16 following several other bench requests. In that order, the Commission concluded that  
17 it is consistent with its procedural rules for it to issue a bench request for the limited  
18 purpose of obtaining information to decide whether to reopen the proceedings and

1 that it cannot consider any information in response to such a bench request in making  
2 its final decision unless it reopens the evidentiary proceedings and provides other  
3 parties an opportunity to respond, as due process requires.

4 {74} On appeal, ABCWUA argues that the Commission’s order denying the motion  
5 to reopen the proceedings violated its own procedural rule, 1.2.2.35(K) NMAC, and  
6 the principles of due process incorporated into that rule. We do not agree.

7 {75} First, the Commission’s order was not a violation of its procedural rules.  
8 1.2.2.35(K) NMAC provides that the Commission may, at any time, “require the  
9 production of further evidence upon any issue” and that “[a]ll parties and staff will  
10 be given an opportunity to reply to such evidence submitted and cross-examine the  
11 witness under oath.” In this case, the evidentiary proceedings were closed, PNM’s  
12 response to the bench request was not in evidence, and the Commission affirmatively  
13 excluded from consideration any information in PNM’s response not already in the  
14 record. Contrary to ABCWUA’s argument, the requirement under 1.2.2.35(K) NMAC  
15 that staff and other parties be given an opportunity to respond to submitted evidence  
16 is inapplicable because the information in PNM’s response was not evidence in the  
17 record. Instead, the Commission requested information to determine whether to  
18 reopen the proceedings, consistent with its authority to reopen the proceedings on its

1 own motion and to consider facts and proposed evidence supporting a party's motion  
2 to reopen the proceedings. 1.2.2.37(E)(4) NMAC (providing that the Commission  
3 may reopen the proceeding on its own motion "when it has reason to believe that  
4 conditions of fact or law have so changed as to require, or that the public interest  
5 requires, the reopening of such proceeding"); 1.2.2.37(E)(1), (2) NMAC (providing  
6 that a party "may file a motion to reopen the proceeding for the taking of additional  
7 evidence" and shall support that motion with a "brief statement of proposed  
8 additional evidence").

9 {76} Second, the Commission's procedure in this case did not violate the  
10 fundamental requirements of due process in the administrative context, namely,  
11 reasonable notice and an opportunity to be heard. *See ABCWUA*, 2010-NMSC-013,  
12 ¶ 21. All parties were notified of Commissioner Lyons' bench request to PNM and  
13 of PNM's response, the parties were provided with an opportunity to respond on the  
14 issue of whether the Commission should reopen the proceedings, and the Commission  
15 considered the motions filed by NEE and the joint movants in making its decision to  
16 not reopen the proceedings. The Commission provided the parties with reasonable  
17 notice and an opportunity to be heard on whether to reopen the proceedings.  
18 Therefore, it was not a denial of due process for the Commission to decline to reopen

1 the proceedings for supplemental evidentiary hearings.

2 {77} ABCWUA contends that the Commission must have considered the  
3 information in PNM's response in making its final decision. However, the  
4 Commission's decisions on Palo Verde in its final order do not rely on the  
5 information from PNM's response to the bench request and instead rely on separate  
6 legal and factual grounds. ABCWUA has not identified what information in PNM's  
7 response it contends the Commission relied on nor has it identified any part of the  
8 Commission's final order which relies on that information. Under Section 62-11-4,  
9 the party appealing a decision by the Commission has the burden of demonstrating  
10 that the decision was unreasonable or unlawful. Without more, we are not persuaded  
11 by ABCWUA's bare assertion that the Commission must have relied on the  
12 information in PNM's response to the bench request in making its decision. *See*  
13 *ABCWUA, 2010-NMSC-013, ¶ 35* (concluding that the appellant had failed to meet  
14 its burden under Section 62-11-4 by failing to present evidence that commissioners  
15 had not reviewed the record).

#### 16 **IV. BALANCED DRAFT**

17 {78} PNM appeals the Commission's decision to deny it recovery for the costs of  
18 converting San Juan Generating Station Units 1 and 4 to a balanced draft system.

1 Balanced draft technology reduces the pressure in the system by both pushing and  
2 pulling the gas through the boiler and environmental controls and is designed to  
3 reduce fugitive emissions. A brief overview of the recent environmental regulatory  
4 history of San Juan is helpful in understanding the context of these costs.

5 {79} Over a number of years, several plans were proposed to implement federal  
6 regulations on haze-causing emissions in New Mexico. *See generally New Energy*  
7 *Economy*, 2018-NMSC-024, ¶¶ 3-5 (discussing the responsibility of states to develop  
8 plans to implement federal environmental regulations and the history of the plans to  
9 control haze-causing emissions in New Mexico). In 2011, the Environmental  
10 Protection Agency (EPA) rejected portions of New Mexico's state implementation  
11 plan and proposed a federal implementation plan which required the installation of  
12 a specific emission control technology on all four San Juan units. *Id.* ¶¶ 3-4  
13 (explaining that the EPA may develop a federal implementation plan if a state  
14 implementation plan is inadequate); *Approval and Promulgation of Implementation*  
15 *Plans; New Mexico*, 76 Fed. Reg. 52388, 52388-89 (Aug. 22, 2011). The New  
16 Mexico Environment Department (NMED) and PNM challenged the federal plan,  
17 arguing that the state plan required a less expensive technology which would satisfy  
18 the federal regulations.

1 {80} As the challenge to the federal plan was pending, in April 2012 an application  
2 for a revision to an air quality permit for San Juan was submitted to NMED on behalf  
3 of PNM. The application contained two possible scenarios—one under the federal  
4 plan and the other under the state plan—both of which also included the conversion  
5 of all the units to balanced draft. A report estimating the costs under both scenarios  
6 concluded that balanced draft may be necessary for the installation of the emission  
7 control technology required by the federal implementation plan but would not be  
8 necessary for the technology in the state implementation plan. NMED issued a permit  
9 which approved both scenarios in August 2012. Subsequently, the EPA approved a  
10 revised state implementation plan which required the closure of San Juan Units 2 and  
11 3 and the installation of the less expensive emission control technology on San Juan  
12 Units 1 and 4. *Approval and Promulgation of Implementation Plans; New Mexico*,  
13 79 Fed. Reg. 60985, 60986 (Oct. 9, 2014). After the approval of the revised state  
14 implementation plan, NMED revised the permits for San Juan, both of which still  
15 incorporated conversion of Units 1 and 4 to balanced draft.

16 {81} In Case No. 13-00390-UT, PNM sought Commission approval to abandon San  
17 Juan Units 2 and 3 and replace that capacity with other generation resources in  
18 accordance with the revised state implementation plan. The Commission resolved that

1 case by approving a stipulation reached by PNM and several other parties in an order  
2 we affirmed in *New Energy Economy*, 2018-NMSC-024, ¶ 46. The stipulating parties  
3 agreed that the installation of the emission control technology at San Juan was  
4 prudent but “also agree[d] that the prudence and reasonableness of the costs of the  
5 balanced draft [would] be determined in a PNM general rate case” in which PNM  
6 would have the burden to “make an affirmative demonstration that incurrence of the  
7 costs of balanced draft was prudent and reasonable.”

8 {82} In this proceeding, PNM sought to include in its rate base the \$52.3 million it  
9 spent to convert San Juan Units 1 and 4 to a balanced draft system. Several parties  
10 opposed the inclusion of the balanced draft costs. During the hearing, WRA  
11 introduced into evidence emails between Bruno Carrara, the Utility Division Director  
12 of the Commission, and Richard Goodyear, the Air Quality Bureau Chief at NMED.  
13 In these emails Carrara asked Goodyear how the balanced draft system came to be  
14 incorporated into the regulatory framework at San Juan. In his response, Goodyear  
15 explained that balanced draft was not required by the regional haze regulation and  
16 was not required for the installation of the less expensive emission control technology  
17 required by the state implementation plan. Goodyear went on to state:

18 Please note that PNM’s assertion that the state of New Mexico required

1 the balanced draft conversion is incorrect. PNM's request to implement  
2 the balanced draft project was entirely voluntary and only appears in the  
3 air quality permit because PNM requested the inclusion of the project in  
4 their air quality application. As PNM was in compliance with all  
5 applicable ambient air quality standards in effect prior to the proposed  
6 installation of the balanced draft project, it should be noted that the  
7 project is not required to comply with any applicable ambient air  
8 standard.

9 PNM witness Chris Olson agreed that PNM proposed balanced draft as an  
10 environmental compliance measure and that balanced draft is not required to comply  
11 with the regional haze requirements.

12 {83} In its final order, the Commission adopted the recommendation of the hearing  
13 examiner and denied PNM recovery for the costs of the balanced draft conversion on  
14 the grounds that PNM had failed to demonstrate that these costs were prudently  
15 incurred. The Commission declined to give the balanced draft costs the presumption  
16 of prudence and rejected PNM's reliance on its permits to demonstrate the prudence  
17 of the costs. The Commission based these decisions on the finding that "[b]ecause  
18 [San Juan] would not be in violation of any environmental standards without the  
19 [balanced draft system], there would have [been] no reason for the NMED to require  
20 its installation but for PNM's request." The Commission rejected PNM's argument  
21 that this finding was outside the scope of its authority. Finally, the Commission



1 rejected PNM’s arguments that the conversion to balanced draft was prudent because  
2 it reduced emissions and improved workplace health and safety, finding that PNM  
3 had failed to demonstrate either with sufficient evidence. On appeal, PNM argues that  
4 the Commission’s conclusion that balanced draft was not required to comply with the  
5 applicable environmental standards was beyond the Commission’s authority and that  
6 the Commission’s finding that the balanced draft costs were imprudent was contrary  
7 to law.

8 {84} We first address whether the Commission exceeded its authority. The scope of  
9 the Commission’s authority and jurisdiction is a question of law and we accord the  
10 Commission’s interpretation of its own jurisdiction “little deference.” *Doña Ana*,  
11 2006-NMSC-032, ¶ 7. By statute, the Commission has the

12       general and exclusive power and jurisdiction to regulate and supervise  
13       every public utility in respect to its rates . . . all in accordance with the  
14       provisions and subject to the reservations of the Public Utility Act, and  
15       to do all things necessary and convenient in the exercise of its power  
16       and jurisdiction.

17 Section 62-6-4(A); *see also* N.M. Const., art. XI, § 2 (“The public regulation  
18 commission shall have responsibility for regulating public utilities . . . in such manner  
19 as the legislature shall provide.”).

20 {85} PNM argues that by finding that the balanced draft conversion was not required

1 for San Juan to comply with the relevant environmental regulations, the Commission  
2 exceeded this statutory authority and infringed on the authority of NMED regarding  
3 environmental regulation. *See Colonias Dev. Council v. Rhino Env'tl. Servs., Inc. (In*  
4 *re Application of Rhino Env'tl. Servs.)*, 2005-NMSC-024, ¶ 14, 138 N.M. 133, 117  
5 P.3d 939 (“The Environmental Improvement Act grants the Department and its  
6 Environmental Improvement Board . . . the power to regulate the environment on  
7 behalf of the citizens of New Mexico.”). Specifically, PNM contends that this finding  
8 by the Commission is contrary to NMSA 1978, Section 74-2-7(L) (2003) which states  
9 that

10 a final decision on a permit by [NMED] . . . that a source will or will not  
11 meet applicable local, state and federal air pollution standards and  
12 regulations shall be conclusive and is binding on every other state  
13 agency and as an issue before any other state agency shall be deemed  
14 resolved in accordance with that final decision.

15 PNM’s argument is unconvincing.

16 {86} The Commission’s finding that balanced draft was included in the permits for  
17 San Juan at PNM’s request and not because it was required by the applicable  
18 environmental regulation was a finding specifically concerning the reasonableness  
19 of costs PNM was seeking to include in its rate base. Such a decision is squarely  
20 within the authority of the Commission under Section 62-6-4(A) to regulate the rates

1 of public utilities and the obligation of the Commission under Section 62-8-1 to  
2 ensure that those rates are just and reasonable. The Commission’s finding did not  
3 concern whether San Juan Units 1 and 4 “meet applicable local, state, [or] federal air  
4 pollution standards,” as prohibited by Section 74-2-7(L), and thus did not exceed the  
5 Commission’s authority.

6 {87} We next turn to whether the Commission’s finding that PNM failed to  
7 demonstrate the prudence of the balanced draft costs was contrary to law. We have  
8 previously recognized that “the Commission has an obligation to allow a utility  
9 expenses that are necessary in providing utility service, that benefit ratepayers, and  
10 that are prudently incurred.” *Zia Nat. Gas Co. v. N.M. Pub. Util. Comm’n (In re Zia*  
11 *Natural Gas Co.)*, 2000-NMSC-011, ¶ 13, 128 N.M. 728, 998 P.2d 564. PNM argues  
12 that the balanced draft costs “were the product of governmental mandates and,  
13 therefore, [were] necessary and presumed prudent.”

14 {88} PNM relies on *Alabama Power*, 237 P.U.R. 4th 337 (Ala. Pub. Serv. Comm’n  
15 2004) to argue that there is a strong presumption that costs incurred to comply with  
16 a governmental mandate, such as environmental compliance costs, are prudent.  
17 However, as the Commission recognized, the decision in *Alabama Power* is based on  
18 the rationale that environmental compliance costs are “not costs that [the utility] can

1 simply choose not to incur” and that the utility “has little or no control in terms of  
2 their timing or their relative magnitude.” 237 P.U.R. 4th at 341-42. Here, however,  
3 the Goodyear email and Olson’s testimony provided substantial evidence to support  
4 the Commission’s finding that there is “at least a strong inference that the Permits  
5 included the installation of the [balanced draft system] primarily because PNM  
6 requested it.” Moreover, PNM’s argument ignores that it agreed in Case No. 13-  
7 00390-UT that it would bear the burden of affirmatively demonstrating the prudence  
8 of the balanced draft costs in its general rate case. Given this prior stipulation and the  
9 evidence indicating that balanced draft was in PNM’s permits primarily at its own  
10 request, it was lawful for the Commission to reject PNM’s argument that the balanced  
11 draft costs were entitled to a presumption of prudence.

12 {89} For the foregoing reasons, we conclude that the Commission’s denial of PNM’s  
13 balanced draft costs was within the Commission’s authority to regulate the rates of  
14 public utilities and was not contrary to law.

15 **V. FOUR CORNERS POWER PLANT COAL SUPPLY AGREEMENT**

16 {90} PNM sought to include \$19.5 million in its cost of service for its portion of a  
17 new fifteen year coal supply agreement (CSA) at Four Corners Power Plant. The new  
18 CSA replaces the previous CSA, which was set to expire in July 2016. Like the

1 previous agreement, the new CSA includes a take-or-pay provision under which the  
2 owners of Four Corners are required to pay for a minimum amount of coal even if  
3 they do not need and take that coal.

4 {91} The hearing examiner recommended that the Commission approve the  
5 inclusion of the CSA costs in PNM's cost of service. Both NEE and the Coalition for  
6 Clean Affordable Energy (CCAЕ) filed exceptions to this recommendation. The  
7 Commission rejected these challenges and adopted the hearing examiner's  
8 recommendation to allow recovery for the CSA costs. On appeal, NEE argues that the  
9 Commission's decision was arbitrary and capricious, contrary to law, and not  
10 supported by substantial evidence. We disagree.

11 {92} First, NEE raises several challenges which go beyond the CSA and are instead  
12 directed, in essence, at the prudence of PNM's continued use of Four Corners as a  
13 generation resource. In its final order, the Commission determined that evidence had  
14 not been presented that PNM had a choice to discontinue its use of Four Corners. On  
15 appeal, NEE broadly points to the testimony of one of its witnesses, David Van  
16 Winkle, to support its contention that evidence was presented that PNM could have  
17 discontinued use of Four Corners in 2016. Nothing in Van Winkle's testimony  
18 undermines the Commission's determination. While Van Winkle testified that in his

1 opinion it was imprudent for various reasons for PNM to make a long term  
2 commitment to Four Corners, the only decision challenged in his testimony was  
3 PNM's decision to sign the new CSA. NEE also relies on Van Winkle's testimony  
4 regarding El Paso Electric Company's decision to cease participation at Four Corners.  
5 However, evidence that El Paso Electric had the choice to discontinue its use of Four  
6 Corners does not, without more, indicate that PNM had the same choice. Accordingly,  
7 the Commission's conclusion that its "primary concern . . . [was] whether the CSA  
8 obtains coal at a reasonable cost and on reasonable terms" was supported by the  
9 evidence in this case, and we decline to recognize NEE's arguments directed at  
10 PNM's continued use of Four Corners as a generation resource.

11 {93} NEE also levels two challenges directed at the Commission's conclusion that  
12 recovery of the cost of the CSA was reasonable. First, NEE contends that *PNM Gas*  
13 *Services*, 2000-NMSC-012 requires that a utility use a cost/benefit analysis to  
14 evaluate contracts with take-or-pay provisions and it was contrary to law for the  
15 Commission to not require PNM to do so here. NEE's reliance on *PNM Gas Services*  
16 to support this proposition is misplaced. In that case, this Court affirmed the  
17 Commission's use of a cost/benefit analysis to determine whether the utility could  
18 recover in its rates the costs of discounts it applied to a take-or-pay rider. *Id.* ¶¶ 26-41.

1 That case did not concern the reasonableness of the take-or-pay contract and, as such,  
2 is inapposite to the issue of whether the cost or terms of the Four Corner's CSA are  
3 reasonable.

4 {94} Second, NEE argues the Commission's conclusion that "NEE's focus on the  
5 choice of coal as a fuel failed to provide any basis upon which [it] could say that the  
6 terms of the CSA were unreasonable" placed the burden on NEE rather than on PNM,  
7 contrary to Section 62-8-7(A). We are not convinced. PNM supported the  
8 reasonableness of the CSA with witness testimony regarding its cost and terms. PNM  
9 witness Susan Taylor testified that, using estimates that were higher than the actual  
10 price of the new CSA, PNM's pre-contract analysis showed that the new CSA was  
11 more cost effective than a gas plant. PNM witness Chris Olson additionally presented  
12 testimony that the take-or-pay provisions in the new CSA are consistent with industry  
13 standards and are comparable to similar provisions in the current San Juan CSA.  
14 Further, Olson testified that the take-or-pay provisions of the new CSA are more  
15 favorable to PNM than the previous CSA in several ways. In its final order, the  
16 Commission expressly discussed this evidence before determining that NEE's  
17 challenge gave it no basis to find that the cost or terms of the CSA were  
18 unreasonable. This finding was based on substantial evidence in the record and did

1 not improperly shift the burden from PNM to NEE.

2 {95} For these reasons, we reject NEE's arguments that the Commission's decision  
3 to include the costs of the Four Corners CSA in PNM's cost of service was arbitrary  
4 and capricious, contrary to law, and not supported by substantial evidence.

5 **VI. RATE 11B**

6 {96} Utilities often charge different classes of ratepayers different rates. *N.M. Att'y*  
7 *Gen. v. N.M. Pub. Regulation Comm'n*, 2015-NMSC-032, ¶ 29, 359 P.3d 133. In this  
8 case, PNM proposed to change its rate design so that the rates charged to the various  
9 rate classes would more accurately reflect the cost of providing service to those rate  
10 classes. The calculated revenue requirements for each rate class varied significantly  
11 and, in order to mitigate dramatic increases for certain rate classes, PNM proposed  
12 a "banding" process which would establish upper and lower limits on the percentage  
13 of the rate increase for each class. However, PNM proposed to not apply rate banding  
14 to Rate 11B, water and sewage utility customers including ABCWUA. Instead, PNM  
15 proposed to increase Rate 11B by the calculated revenue requirement for the class,  
16 which was lower than the lower limit of the band.

17 {97} PNM supported its proposal to exclude Rate 11B from rate banding with the  
18 testimony of Stella Chan and David Aguirre. Chan testified that PNM proposed



1 excluding Rate 11B from rate banding to “effectuate the intent of the Amended  
2 Stipulation” in Case No. 10-00086-UT. According to both Chan and Aguirre’s  
3 testimony, PNM agreed in the Amended Stipulation to work cooperatively with Rate  
4 11B customers to ensure that those customers would not be “unduly penalized” by a  
5 proposed change to PNM’s time of use (TOU) on-peak period. Rates charged during  
6 TOU on-peak periods are higher than those in off-peak periods to reflect the cost of  
7 serving customers and to encourage customers to use electricity during off-peak  
8 periods. In this case, PNM proposed to shift its TOU on-peak period by two hours to  
9 more accurately reflect its generation and delivery costs.

10 {98} Chan and Aguirre both further testified that the agreement reached between  
11 PNM and the Rate 11B customers, including ABCWUA, was to shift the data used  
12 to calculate Rate 11B’s rates by two hours in anticipation of the two hour TOU on-  
13 peak period shift and in recognition of the historical ability of Rate 11B customers  
14 to adjust the majority of their usage to off-peak hours. Chan testified that the benefits  
15 of that agreement with Rate 11B customers would be reversed if rate banding was  
16 applied to Rate 11B, which was why PNM proposed to exclude Rate 11B from rate  
17 banding.

18 {99} However, ABCWUA witness Joseph Herz presented testimony which criticized

1 PNM’s proposed two hour TOU shift and recommended that the Commission not  
2 approve that shift until a more complete analysis had been performed. On  
3 examination by the hearing examiner, Herz testified that the agreement between PNM  
4 and ABCWUA did not include the proposed two hour shift and that he did not  
5 support such a shift. Herz testified that the agreement instead concerned the  
6 methodology used to calculate Rate 11B’s demands for cost allocation purposes and  
7 would apply whether or not the Commission approved the two hour TOU shift.  
8 Finally, Herz admitted that PNM proposed to exclude Rate 11B from banding “in  
9 order to effectuate some of the goals of the stipulation” but testified that, in his  
10 opinion, Rate 11B should be excluded from banding whether or not the TOU shift  
11 was approved.

12 {100} In its post-hearing brief, PNM stated that its proposal to exclude Rate 11B from  
13 rate banding “was specifically and explicitly stated to be in accordance with  
14 Paragraph 39 of the Amended Stipulation, which presumed that the TOU pricing  
15 period would be changing.” PNM recognized that Herz opposed the TOU shift and  
16 argued that, should the TOU shift not be approved, “the Commission should re-visit  
17 PNM’s proposal to leave Rate 11B out of the banding process.” In its response brief,  
18 ABCWUA claimed this was a change in position for PNM and argued that due

1 process required that the Commission not consider it.

2 {101} The hearing examiner rejected ABCWUA's due process argument and  
3 recommended denying PNM's proposal to exclude Rate 11B on two bases: (1) the  
4 conflicting positions of PNM and ABCWUA as to whether their agreement was  
5 contingent on the TOU shift; and (2) that there was testimony that PNM's proposal  
6 would shift costs to other ratepayers but no testimony as to the extent of that impact.  
7 The Commission adopted the hearing examiner's findings, specifically noting that the  
8 recommendation was based on the lack of adequate evidence supporting the proposal.

9 {102} On appeal, ABCWUA challenges the Commission's decision on several  
10 grounds, but its primary contention is that the Commission's decision violated its  
11 right to due process of law. As we have previously discussed, "the fundamental  
12 requirements of due process in an administrative context are reasonable notice and  
13 opportunity to be heard and present any claim or defense." *ABCWUA*, 2010-NMSC-  
14 013, ¶ 21 (quoting *Jones*, 1983-NMSC-089, ¶ 6). ABCWUA repeats its contention  
15 that the Commission's decision was based on PNM's post-hearing brief, which  
16 ABCWUA argues deprived it of notice and a meaningful opportunity to be heard.  
17 Specifically, ABCWUA argues that PNM's testimony did not connect exclusion of  
18 Rate 11B to the proposed TOU shift and, therefore, ABCWUA was denied an

1 opportunity to respond to that argument. ABCWUA's arguments are contrary to the  
2 record and are without merit.

3 {103} Chan's testimony expressly connected PNM's proposal to exclude Rate 11B  
4 from rate banding with the Amended Stipulation from Case No. 10-00086-UT, which  
5 the testimony of both Chan and Aguirre consistently connected with PNM's proposal  
6 to shift the TOU on-peak period by two hours. This testimony provided ABCWUA  
7 with more than adequate notice of the connection between these two issues. Not only  
8 did ABCWUA receive this notice, it was provided with an opportunity to respond to  
9 PNM's position and did so. ABCWUA witness Herz presented testimony on the  
10 proposed two hour TOU shift, the agreement between PNM and ABCWUA pursuant  
11 to the Amended Stipulation, and PNM's proposal to exclude Rate 11B from rate  
12 banding.

13 {104} However, Herz's testimony conflicted with the testimony of Chan and Aguirre  
14 on these issues. This conflicting testimony, together with the lack of evidence on the  
15 effects of PNM's proposal on other ratepayers, failed to persuade the hearing  
16 examiner and, ultimately, the Commission that PNM's proposal to exclude Rate 11B  
17 from rate banding would result in just and reasonable rates. It was for that reason, and  
18 not any alleged change in position in PNM's post-hearing brief, that the Commission

1 rejected PNM’s proposal to exclude Rate 11B from rate banding. This decision by the  
2 Commission was reasonable, was supported by the evidence in the record, and was  
3 not made in violation of ABCWUA’s right to due process of law.

#### 4 **VII. PREPAID PENSION ASSET**

5 {105} NMIEC claims that the Commission’s inclusion of the \$137.8 million Prepaid  
6 Pension Asset (PPA) in PNM’s rate base was contrary to *New Mexico Attorney*  
7 *General*, 2015-NMSC-032, and was supported by insufficient evidence. NMIEC’s  
8 arguments are unavailing on this point.

9 {106} A PPA is “the amount by which investor contributions to a pension trust and  
10 earnings on those contributions exceed pension expenses.” *N.M. Att’y Gen.*, 2015-  
11 NMSC-032, ¶ 3. Ratepayers benefit from this excess because its earnings are deemed  
12 to be income for a utility, reducing the amount of revenue the utility must collect from  
13 ratepayers. *Id.* ¶ 5. Consequently, this Court has held “that some or all of a prepaid  
14 pension asset should be included in the rate base to the extent that the evidence  
15 evinces that the asset was investor-funded, as opposed to ratepayer-funded.” *Id.* ¶ 19.  
16 We admonished utilities not to “voluntarily overfund their pension funds simply to  
17 earn a favored rate of return.” *Id.* ¶ 22.

18 {107} On appeal, NMIEC claims that the “totality of the testimony in the record” in

1 this case “demonstrates that PNM has failed to show that the PPA amounts it seeks  
2 to include in rates are entirely funded by shareholder capital.” Specifically, NMIEC  
3 contests the use of illustrative cost of service estimates from prior settlement  
4 agreements as evidence of investor contributions to pension funds. PNM contends  
5 that sufficient evidence did support the hearing examiner’s determination that the  
6 PPA was investor-funded and that the Commission previously relied on illustrative  
7 cost of service to determine the reasonableness of rates in Case No. 10-00086-UT.  
8 {108} In the proceedings below, PNM witnesses Elisabeth Eden and Jason Peters  
9 testified that the amount PNM sought to recover for its PPA was based on actuarial  
10 calculations which determined the amount of legally required investor contributions  
11 to PNM’s pension funds. NMIEC witness Michael Gorman testified that PNM had  
12 failed to prove that it had not recovered its pension contributions from ratepayers and  
13 questioned PNM’s evidence that the PPA had resulted exclusively from investor  
14 contributions. PNM witness Jason Peters provided rebuttal testimony including  
15 further documentation of the investor contributions to the PPA.

16 {109} Based on this evidence, the hearing examiner concluded that PNM investors  
17 contributed to the pension fund as they were legally required to do and that those  
18 contributions exceeded pension expenses such that the PPA could properly be

1 included in PNM's rate base. In making this recommendation the hearing examiner  
2 rejected NMIEC's argument against the reliability of illustrative cost of service data,  
3 finding that such data was appropriate to help document investor contributions to the  
4 pension fund and that NMIEC had not suggested an alternative way for PNM to  
5 calculate those contributions. The Commission adopted the hearing examiner's  
6 recommendation, specifically finding that PNM's use of illustrative cost of service  
7 was reasonable.

8 {110} Viewing the entire record in the light most favorable to the Commission's  
9 decision, we conclude that there is substantial evidence to support the Commission's  
10 determination that the PPA was investor, rather than ratepayer, funded. *See NMIEC*,  
11 2007-NMSC-053, ¶ 24. The Commission's determination regarding the use of  
12 illustrative cost of service data is well within the Commission's technical expertise.  
13 NMIEC recognizes that the record contains specific testimony supporting that the  
14 PPA was investor funded, yet challenges the persuasiveness of that testimony.  
15 NMIEC asks that we reweigh the evidence, which we will not do, especially on this  
16 technical matter. *ABCWUA*, 2010-NMSC-013, ¶¶ 18, 50. Accordingly, we reject  
17 NMIEC's substantial evidence challenge on this point.

18 {111} Nor do we conclude that the Commission improperly removed the burden of

1 proof from PNM, as contended by NMIEC. NMIEC relies on the statement by the  
2 hearing examiner that “NMIEC does not suggest how PNM could have alternatively  
3 calculated the amount of ratepayer contributions.” We have addressed this type of  
4 argument before. *See ABCWUA*, 2010-NMSC-013, ¶ 83 (“[T]he [Commission] did  
5 not shift the burden of proof to the opposing parties; the [Commission] simply held  
6 that the opposing parties had failed to discredit or rebut PNM’s evidence[.]”). As in  
7 *ABCWUA*, the Commission did not shift the burden of proof on this matter merely by  
8 noting that NMIEC did not offer evidence it found persuasive to counter that  
9 evidence offered by PNM.

10 {112} For the foregoing reasons, we reject NMIEC’s arguments on appeal and  
11 conclude that the Commission’s decision to allow PNM to recover \$137.8 million for  
12 its PPA is in accordance with the law and supported by substantial evidence.

### 13 **VIII. METHOD A**

14 {113} NMIEC appeals the adoption of Method A, which adjusts PNM’s methodology  
15 for calculating customer fuel costs. NMIEC’s primary contention is that Method A  
16 violates the statutory rate caps established in NMSA 1978, Section 62-16-4 (2014).<sup>4</sup>

---

17 <sup>4</sup>These statutory rate caps were recently amended by our Legislature. *See* 2019  
18 N.M. Laws, ch. 65, § 29 (removing the statutory rate caps for large customers and  
19 amending the manner in which certain government customers are exempt). How these



1 Because Method A does not increase the amount large and exempt customers pay for  
2 renewable energy and instead ensures that those customers will more accurately pay  
3 for their use of conventional energy, we hold that Method A does not violate the  
4 statutory rate caps under Section 62-16-4 (2014). We likewise reject NMIEC’s  
5 arguments that Method A was adopted in violation of due process, is arbitrary and  
6 capricious, and would not result in just and reasonable rates.

7 {114} As we have discussed, utilities charge different rates to different customer  
8 classes. *N.M. Att’y Gen.*, 2015-NMSC-032, ¶ 29. These classifications are often based  
9 on fuel needs, the purpose for which the fuel will be used, the time and duration of  
10 fuel use, and the possibility that a large customer could undertake self-generation if  
11 charged too much. II Leonard Saul Goodman, *The Process of Ratemaking* 964 (1998);  
12 *see also N.M. Att’y Gen.*, 2015-NMSC-032, ¶¶ 29-30 (discussing the utilization of  
13 “cost allocation” in ratemaking). This concept, called “cost allocation” or “differential  
14 rates,” can be used to advance various policy objectives. *N.M. Att’y Gen.*, 2015-

---

15 amendments change the method by which PNM will allocate its fuel costs is a matter  
16 for the Commission. *See N.M. Att’y Gen. v. N.M. State Corp. Comm’n*, 1996-NMSC-  
17 002, ¶ 11, 121 N.M. 156, 909 P.2d 716 (“[T]his Court is not a rate-making body.”).  
18 Accordingly, this opinion does not address this change in law, but instead addresses  
19 the arguments regarding Method A under the law in effect at the time of the  
20 Commission’s final order in this case.

1 NMSC-032, ¶¶ 29-30.

2 {115} Section 62-16-4 (2014) of the New Mexico Renewable Energy Act, NMSA  
3 1978, Sections 62-16-1 to -10 (2004, as amended through 2014) directs the  
4 Commission to apply differential rates to promote the development of renewable  
5 energy. *See N.M. Att’y Gen.*, 2015-NMSC-032, ¶¶ 30, 41. The cost of a utility’s  
6 renewable energy portfolio is shared among three customer classes. First, large  
7 customers are capped in their contribution to the renewable energy portfolio under  
8 Section 62-16-4(A)(2) (2014) (capping the contribution for “nongovernmental  
9 customers at a single location or facility . . . with consumption exceeding ten million  
10 kilowatt-hours per year”). Second, government customers that take specific steps to  
11 develop their own renewable energy generation are exempt from contributing to the  
12 renewable energy portfolio under Section 62-16-4(A)(3) (2014). Finally, other  
13 customers are not capped in their contribution but are protected under a reasonable  
14 cost threshold set by the Commission. *See* Section 62-16-4(C) (2014).

15 {116} The fuel costs required to generate electricity are among the expenses public  
16 utilities can recover through rates. PNM has previously recovered some of its fuel  
17 costs through its base fuel rate, which reflects an average fuel cost. But, to account  
18 for fluctuations in fuel and purchased power costs, there is a statutory and regulatory

1 mechanism called a fuel and purchased power cost adjustment clause (FPPCAC).  
2 *ABCWUA*, 2010-NMSC-013, ¶ 2; *see also* 17.9.550.6(D) NMAC (“[T]he objective  
3 of a[n] FPPCAC is to flow through to the users of electricity the increases or  
4 decreases in applicable fuel and purchased power expense per kilowatt-hour of  
5 delivered energy above or below a base fuel and purchased power expense.”). The  
6 intended effect of an FPPCAC is to allow a utility company to collect its actual fuel  
7 costs. *See* 17.9.550.6(C) NMAC (stating that one objective of the FPPCAC rule is to  
8 “assure that utilities collect through the FPPCAC the amount actually expended for  
9 fuel and purchased power costs”). As explained by the hearing examiner,

10 [i]f [a utility company’s] actual fuel costs are greater than the revenues  
11 it collects from its base fuel rate, it recovers its undercollected fuel costs  
12 through its FPPCAC. Conversely, if [a utility company’s] actual fuel  
13 costs are less than the revenues it collects from its base fuel rate, [it]  
14 returns its overcollected fuel revenues to customers through its  
15 FPPCAC.

16 {117} The record indicates that the previous FPPCAC formula was the total projected  
17 fuel costs for the time period at issue, adjusted by the over- or undercharged amount  
18 for the prior period, divided by the total amount of energy projected to be billed in the  
19 period. This method, in effect, underpriced the fuel cost for conventional energy by  
20 including in the denominator the projected amount of both conventional and

1 renewable energy, even though renewable energy does not have any associated fuel  
2 cost.

3 {118} Although all customer classes were affected by this FPPCAC formula, the  
4 method of calculation resulted in a windfall to large customers, who were  
5 simultaneously undercharged for their conventional energy usage and statutorily  
6 capped in their contribution to the renewable energy portfolio under Section 62-16-  
7 4(A) (2014). This benefit could be substantial. For example, one large customer saved  
8 approximately \$766,000 more in fuel costs from the inclusion of renewable energy  
9 in the FPPCAC than it contributed to the renewable energy portfolio.

10 {119} In a series of cases over several years, the Commission sought to properly  
11 construe and then address this windfall to large customers. In this case, the  
12 Commission ordered PNM to revise its method for calculating fuel costs, specifically  
13 ordering PNM to remove renewable energy from its FPPCAC calculation. To carry  
14 out this order, PNM proposed Method A. Under Method A, PNM, in relevant part,  
15 (1) recovers all fuel and purchased power costs through the FPPCAC and none  
16 through its base rate; (2) excludes estimated renewable energy from the calculation  
17 of estimated nonrenewable fuel costs, such that nonrenewable fuel cost calculations  
18 include only estimated nonrenewable energy; and (3) breaks the FPPCAC charges to

1 a customer into two parts which reflect the customer's use-ratio of nonrenewable  
2 energy to renewable energy, which always has a zero fuel cost.

3 {120} WRA Witness Dr. Douglas Howe testified in support of Method A, explaining  
4 that it would partially correct the fuel cost misallocation by more accurately charging  
5 customers for the true costs of their conventional energy usage. Dr. Howe believed  
6 that Method A would "clarify the costs and benefits of renewable energy" by  
7 allowing customers to "see explicitly the fuel costs of the conventional resources that  
8 serve them, and the zero fuel cost of the renewable energy that serves them." Dr.  
9 Howe testified that Method A would "provide a more accurate presentation and fair  
10 outcome for all PNM customers."

11 {121} Commission Staff recommended that the Commission adopt a modified version  
12 of Method A. The hearing examiner considered both Method A and the modified  
13 version and recommended that Method A be adopted without modification. The  
14 Commission agreed and ordered the adoption of Method A.

15 **A. Method A is a Lawful Exercise of Commission Authority and Does Not**  
16 **Violate the Statutory Rate Caps in Section 62-16-4 (2014)**

17 {122} NMIEC first contends that Method A is unlawful because it imposes additional  
18 costs on customers whose renewable energy costs are capped under Section 62-16-

1 4(A) (2014). We disagree and hold that Section 62-16-4(A) (2014) limits only  
2 renewable energy costs and does not otherwise restrict the Commission’s authority  
3 to increase the cost of conventional energy usage in order to provide for just and  
4 reasonable rates.

5 {123} In addition to requiring utilities to procure an increasing percentage of  
6 renewable energy each year, Section 62-16-4 (2014) limits the amount that utilities  
7 can charge certain customers for renewable energy. Section 62-16-4(A)(2) (2014)  
8 provides that “the kilowatt-hours of renewable energy procured for [large] customers  
9 shall be limited so that the *additional cost* of the *renewable* portfolio standard to each  
10 customer does not exceed the lower . . . of two percent of that customer’s annual  
11 electric charges or ninety-nine thousand dollars (\$99,000).” (emphasis added).  
12 Government customers who take specified steps to produce their own renewable  
13 energy are exempt from contributing to the renewable energy portfolio under Section  
14 62-16-4(A)(3) (2014).

15 {124} NMIEC relies on *New Mexico Attorney General, 2015-NMSC-032* to argue  
16 that the Legislature intended Section 62-16-4(A) (2014) to limit the total electricity  
17 cost for large customers. However, NMIEC misconstrues *New Mexico Attorney*  
18 *General*. In that case, we affirmed the Commission’s discretion to permit utilities to

1 recover renewable energy costs that exceeded the statutory cap from non-capped  
2 customers. *N.M. Att’y Gen.*, 2015-NMSC-032, ¶¶ 34-36. We explained that the  
3 purpose of the statutory rate caps is to protect large and exempt customers from  
4 renewable energy costs, rejecting the contention that utilities must reduce their  
5 renewable energy procurement whenever costs exceed the statutory cap, and thereby  
6 protect other customers from bearing these costs. *Id.* ¶¶ 30, 45-46. We did not,  
7 however, hold that Section 62-16-4(A) (2014) protects large and exempt customers  
8 from paying the full costs of their conventional energy usage.

9 {125} NMIEC further contends that “[i]f the Legislature believed that . . . [there was]  
10 an unfair misallocation of fuel costs” it “would have added clear, unequivocal  
11 language” correcting that fuel misallocation. We disagree. Section 62-16-4(A)(2)  
12 (2014) expressly limits what large and exempt customers will pay for renewable  
13 energy but is silent with respect to the burden on those customers for the costs of  
14 conventional energy. This silence does not bar the Commission from otherwise  
15 allocating the costs of conventional energy usage or otherwise exercising its authority  
16 to provide for just and reasonable rates. *State v. Wyrostek*, 1994-NMSC-042, ¶ 17,  
17 117 N.M. 514, 873 P.2d 260 (“We do not read language into the Act that is not  
18 there.”).

1 {126} Provided renewable energy costs do not exceed the statutory rate caps, Section  
2 62-16-4 (2014) does not restrict the Commission’s authority to regulate a utility’s  
3 method for charging customers for fuel usage. Method A does not impose additional  
4 charges for renewable energy usage on large and exempt customers, but rather  
5 increases their fuel costs to more accurately reflect the true costs of their conventional  
6 energy usage. Therefore, we conclude that Method A does not violate the statutory  
7 rate caps in Section 62-16-4(A) (2014) and is a lawful exercise of Commission  
8 authority.

9 **B. The Commission’s Adoption of Method A Was Consistent with Due**  
10 **Process**

11 {127} NMIEC asserts that Method A was adopted in violation of due process,  
12 specifically arguing that it was adopted as a result of a biased or predetermined  
13 process. For the following reasons, we disagree.

14 {128} In Case No. 13-00183-UT, the Commission heard testimony regarding a  
15 possible misallocation of fuel costs and directed PNM to “identify whether or not  
16 there are ‘disproportionate fuel benefits’ and address rate and ratemaking issues and  
17 the associated and interrelated impacts on customer class related base rates, base fuel  
18 costs, the fuel clause and adjustments, as well as the renewable rate rider.”



1 Subsequently, in Case No. 15-00166-UT, the Commission concluded that the issue  
2 had been mischaracterized until that point and rejected a proposed solution in the  
3 form of a rate-rider. Instead, the Commission determined that the more appropriate  
4 approach would be to consider changes to the FPPCAC in a separate docket with  
5 more information. In this case, the Commission adopted Method A after considering  
6 the arguments for and against it, as well as a modified version of Method A proposed  
7 by Commission Staff. This process is distinguishable from the biased and  
8 predetermined decision that resulted in a denial of due process in the case relied on  
9 by NMIEC, *Reid v. New Mexico Board of Examiners in Optometry*, 1979-NMSC-005,  
10 ¶¶ 4, 9, 92 N.M. 414, 589 P.2d 198 (concluding that due process was denied when a  
11 board member, prior to disciplinary proceedings, said that the subject of the  
12 proceedings “would be losing his license soon”).

13 {129} NMIEC further challenges the Commission’s authority to solicit evidence, but  
14 “[a]t any stage of the proceeding the commission or presiding officer may require the  
15 production of further evidence upon any issue.” 1.2.2.35(K) NMAC. Under Section  
16 62-6-4(A), the Commission has the authority to “do all things necessary and  
17 convenient in the exercise of its power and jurisdiction,” including the discretion to  
18 solicit evidence in fulfillment of its statutory directives. *Las Cruces Prof'l Fire*

1 *Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶¶ 31-32, 123 N.M. 239, 938 P.2d  
2 1384 (affirming the administrative power “to consider evidence elicited by its own  
3 questions”). “[I]t could hardly be envisioned that Commissioners would sit as  
4 spectators, like Roman Emperors in the coliseum, and simply exhibit a ‘thumbs-up  
5 or thumbs-down’ judgment after the dust of battle settles in the arena.” *Mountain*  
6 *States Tel. & Tel. Co.*, 1977-NMSC-032, ¶ 19. The Commission correctly adopted its  
7 rejection of NMIEC’s similar arguments in Case No. 15-00166-UT.

8 {130} Additionally, the record does not support that NMIEC did not have reasonable  
9 notice or an opportunity to be heard, which are the fundamental requirements of due  
10 process in this context. *See ABCWUA*, 2010-NMSC-013, ¶ 21. As noted by the  
11 Commission, “this issue has had a long history and NMIEC has been a party to all of  
12 the proceedings[.]” NMIEC had ample opportunity to challenge Method A. NMIEC  
13 presented testimony regarding the impact of Method A and cross-examined PNM  
14 witness Gerard Ortiz regarding the alleged fuel misallocation, *inter alia*. NMIEC  
15 witness James Dauphinais testified that “NMIEC does not believe that under New  
16 Mexico law there is a disproportionate fuel benefit” and that “the cost and burden of  
17 Method A are not justified by the amount of fuel costs that would be reallocated.”  
18 Finally, NMIEC voiced its objections to Method A in its post-hearing briefing to the

1 Commission. This met the requirements of due process under *ABCWUA*, 2010-  
2 NMSC-013, ¶ 21.

3 {131} Finally, the Commission’s decision to stay Case No. 16-00016-UT did not  
4 deprive NMIEC of an opportunity to challenge the imposition of a fuel clause  
5 adjustment. NMIEC had the opportunity to object to the stay, did not, and availed  
6 itself of the opportunity to challenge the imposition of a fuel clause adjustment in the  
7 instant case. For the foregoing reasons, we conclude that Method A was adopted in  
8 accordance with the requirements of due process and not as a result of a biased  
9 process, as alleged by NMIEC.

10 **C. The Commission’s Adoption of Method A Was Otherwise Lawful and**  
11 **Reasonable**

12 {132} NMIEC challenges the reasonableness of Method A on various other grounds.  
13 However, there was substantial evidence to support the adoption of Method A,  
14 including Dr. Howe’s testimony that Method A would correct the identified fuel cost  
15 misallocation and would result in a fairer outcome for all customers. We reject the  
16 argument that Method A is arbitrary and capricious and imposes an improper  
17 surcharge identical to the rate-rider the Commission rejected in Case No. 15-00166-  
18 UT. As the Commission explained, it rejected the surcharge approach and “the very

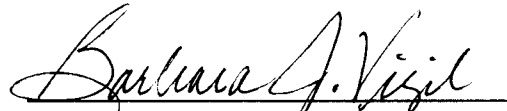
1 notion of a [disproportionate avoided fuel benefit]” after determining that “the entire  
2 . . . issue arose through an error in PNM’s fuel cost calculations.”

3 {133} We also reject the argument that Method A is inherently flawed and unjust  
4 because its calculation did not include all quantifiable costs and benefits, as required  
5 to calculate the reasonable cost threshold under 17.9.572.14(C) NMAC. The record  
6 gives us no basis to conclude that fuel cost calculations are subject to the same  
7 requirements as the reasonable cost threshold and the matter is of a technical nature  
8 warranting heightened deference to the Commission. *See ABCWUA, 2010-NMSC-*  
9 *013, ¶ 50.* The parties and the hearing examiner devoted significant attention to the  
10 calculation of Method A. For these reasons, we hold that the adoption of Method A  
11 was lawful and reasonable.

## 12 **IX. CONCLUSION**

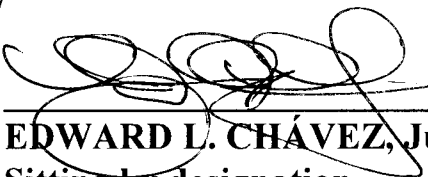
13 {134} We conclude that virtually all of the Commission’s decisions are reasonable  
14 and lawful, but because we conclude that the Commission’s denial of any future  
15 recovery for nuclear decommissioning costs violated PNM’s right to due process of  
16 law we vacate and annul the Commission’s final order en toto. *See Section 62-11-5;*  
17 *Hobbs, 1993-NMSC-032, ¶ 6.* We therefore remand to the Commission for further  
18 proceedings consistent with this opinion.


1 {135} IT IS SO ORDERED.

2   
3 **BARBARA J. VIGIL, Justice**

4 **WE CONCUR:**

5   
6 **JUDITH K. NAKAMURA, Chief Justice**

7   
8 **EDWARD L. CHÁVEZ, Justice, retired**  
9 **Sitting by designation**

10   
11 **J. MILES HANISEE, Judge**  
12 **Sitting by designation**

13 **PETRA JIMENEZ MAES, Justice, retired**  
14 **Sitting by designation, not participating**